82-1793

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD
and DIRECTOR OF THE DEPARTMENT OF
ALCOHOLIC BEVERAGE CONTROL,
Petitioners,

vs.

LEWIS-WESTCO COMPANY,
Respondent.

PETITION FOR CERTIORARI

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QUESTIONS FOR REVIEW

1. Whether A State Statute Requiring Each Liquor Wholesaler To Periodically File Price Schedules With The State And Be Bound By Them Violates The Sherman Act?

2. Where A State Licensed Wholesaler Binds Only Itself In Posting Prices, What Degree Of State Involvement Is Needed to Satisfy The State Action Requirement?

3. Where a State Liquor Regulation Does Not Require A Per Se Violation Of The Sherman Act, Can The State Rely Upon Competitive Forces To Operate Rather Than Fully Occupying The Area?

4. Did Congress Intend To Allow Invalidation Of State Liquor Legislation On Sherman Grounds Where It Withdrew All Of Its Commerce Power Over Such Legislation?

5. If The State Has A Valid Reason For A Liquor Regulation Does The 21st Amendment Prevail Over Sherman Act Policies?

LIST OF PARTIES

The parties are listed in the caption. Both Wine and Spirits Wholesalers of California and the California Beer Wholesalers Association sought to intervene in the Court of Appeal, but such intervention was denied.

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DECISIONS BELOW

The California Court of Appeal decision sought to be reviewed—

Lewis-Westco & Co. v. Alcoholic Beverage Etc. Appeals Bd. (1982) 136 Cal.App.3d 829, is Appendix A.

The decision of the Appeals Board is Appendix B.

The decision of the Department is Appendix C.

JURISDICTION

Jurisdiction lies under 28 U.S.C. § 1257(3) since the decision challenged found a state statute in violation of the Sherman Act.

The Court of Appeal decision as modified was made on November 18, 1982.

Since the California Supreme Court denied our Petition For Hearing on February 3, 1983, this petition is timely.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Texts are provided in Appendix D.

U.S. Constitution 21st Amendment, Section 2. California Constitution, Article 20, Section 22

FEDERAL STATUTES

15 USC § 1

27 USC §§ 121, 122

STATE STATUTES

Business & Professions Code

§ 23402
23815
24013
24400
24756
25500
25502
25503

Title 4, California Administrative Code § 100.

STATEMENT OF THE CASE

1. Lewis-Westco Company is a licensed California distilled spirits wholesaler. The State Department of Alcoholic Beverage Control filed charges against this license alleging that Lewis-Westco had violated Business and Professions Code section 24756 and Title 4, California Administrative Code section 100. These provisions of California law require, *inter alia,* a wholesaler to submit its price schedules to the Department by the 15th of the

month where they become public records. A wholesaler can amend its schedules to meet a lower price of a competitor up to the 1st of the following month. Thereafter it is bound to sell at those prices for 30 days. (At the time of these violations the period was 60 days.)

There was and is no dispute that respondent in fact sold distilled spirits at prices below those contained in the schedules it had filed with the Department. Respondent instead at the hearing attacked the price posting statute and its underlying regulation on the ground that they were invalid under the Sherman Act.[1] The Department after a hearing, found the violations to have occurred and imposed 10 day concurrent suspensions stayed upon certain probationary conditions. (See App. C.)

Respondent, as is required, appealed to the Alcoholic Beverage Control Appeals Board again challenging the constitutionality of the statute and regulation. The Appeals Board affirmed the decision. (See App. B.)

Respondent then filed a writ of review in the California Court of Appeal. The Court granted the writ and issued a decision finding the state statute and regulation in violation of the Sherman Act. The opinion, as modified on denial of rehearing was issued on November 18, 1982. The California Supreme Court denied hearing on February 3, 1983. (See App. A.)

While this case involves the wholesale level, a grasp of California's basic statutory system of liquor regulation is necessary to understand this matter. It is a three-tiered licensing system whereby distillers, wholesalers and retailers may operate only on one level. Business and Profes-

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[1]Lewis-Westco raised the constitutionality of the legislation in light of the Sherman Act both orally and in writing before the Department. Appendix E contains a few pertinent pages of the hearing transcript and written argument. Included also is an extract of Lewis-Westco's brief before the Appeals Board.

sions Codes § 25500 and 25502. Retail licenses are limited in number generally by population of the county. Business and Professions Code §§ 23815 et seq.. A retail license can be transferred or issued only after appreciable delays as not only government entities, but citizens can delay issuance by written protest. Business and Professions Code § 24013. A retailer may only purchase from a licensed wholesaler. Business and Professions Code § 23402.

Given these restrictions upon the retail level—difficult and delayed entry and limitation upon sources of supply—the regulatory system compensates by providing certain protections. One is the right of small retailers to band together to obtain quantity discounts through collective purchasing (pool buying). Business and Professions Code §§ 24400 et seq.. Another is a prohibition on price discrimination against retailers. Business and Professions Code § 25503(e).

The third, price posting, is at issue in this case. Price posting is a critical element in the State's overall alcoholic beverage regulatory program because it is what really makes the anti-price discrimination and pool buying provisions work. The price posting system whereby each wholesaler files its price schedules and is bound by them for a given period combined with the fact that these schedules are made public and regularly disseminated by private publications to retailers generally, provides the means for the early detection and effective prosecution of price discriminators. Moreover, retailers who elect to pool their money to take advantage of deep quantity discounts normally available only to large volume buyers are greatly assisted by the ready availability of the price postings on file with the Department. The retailers as well as the Department's investigators can determine almost instantly whether the price they have paid is consistent with prices charged other retailers purchasing under the same condi-

tions. In short, price posting provides vital protection to the small retailer and is a valuable enforcement tool for the Department.

The Court of Appeal found that the system *in effect* was a per se violation of the Sherman Act. It found that the state action exemption did not apply because the state was insufficiently involved and that the state interests were insufficient to invoke the 21st Amendment. The decision placed great stress upon similarity of prices in reaching its conclusion.

The Court of Appeal decision in this case confuses price fixing with price posting by holding the effects are the same; refuses to recognize that a state interest—here prevention of price discrimination—justifies price posting; holds similarity of prices alone is enough to show anti-competitive effects; and unreasonably limits the state action exemption by requiring excessive state involvement in the regulatory program.

In addition the most fundamental error of the Court of Appeal was its refusal to recognize the significance of *Rice v. Norman Williams Co., supra,* ..... U.S. ..... [73 L.Ed.2d 1042]. In that case this Court held that a state statute could not be invalidated under the Sherman Act merely because its *effect* lessened competition. This Court concluded that there had to be a clear facial conflict. The Court of Appeal chose not to follow that interpretation of the Sherman Act but rather followed the concurring opinion in *Norman Williams.*

2. Business and Professions Code section 24756 and rule 100 require wholesalers to post with the Department the prices at which *they* themselves will sell. They can lower the price list to match a lower price filed by a competitor.

Two things are apparent: the action of posting the prices with the Department is *compelled* by the state and this is *not* a price fixing statute as the wholesaler only binds itself.

Rather than a *grant* of economic power to a private party as occurred in *Rice v. Alcoholic Bev. Etc. Appeals Bd.* (1978) 21 Cal.3d 431 and *California Liquor Dealers v. Midcal Aluminum* (1980) 445 U.S. 97, this statute is actually a limitation upon a wholesaler's power.

As previously mentioned California extensively regulates alcoholic beverages (Cal. Const., art. XX, § 22). Those engaged in the business not only require licenses, which are restricted in number, but with limited exceptions, may only engage in only one of three levels in the distribution process. For an analysis of the underlying rationale, see *California Beer Wholesalers Assn., Inc. v. Alcoholic Bev. Etc. Appeals Bd.* (1971) 5 Cal.3d 402, 407-408 and *National Distributing Co. v. U.S. Treasury Dept.* (D.C. 1980) 626 F.2d 997.

The distinction between price fixing and price posting was made clear in *Ralph's Grocery Co. v. Reimel* (1968) 69 Cal.2d 172, 180, 181, wherein the court stated:

> "We need not inquire into whether section 25006 meets this claimed test on specificity, however, because rule 105(a) does not constitute 'price fixing'. Rule 105(a) allows each manufacturer and wholesaler to set prices as he wishes. The price competition between brands remains unimpeded. Rule 105(a) only operates to prevent variations in the price established by the manufacturer and wholesalers."

> "The prohibition on a discriminatory price cannot be deemed a directive to fix a price; the manufacturer or wholesaler may sell at whatever he chooses, but he may not post different or discriminatory prices for one buyer than for another. The prohibition of price discrimination in the sale of beer is no more a mandate that beer be sold at a fixed price than the prohibition of race discrimination in the sale of property is a mandate that property be sold at a fixed price."

Thus the cases prohibiting *price fixing: Rice v. Alcoholic Bev., Etc. Appeals Bd.* (1978) 21 Cal.3d 431; *Capiscean Corp. v. Alcoholic Bev., Etc. Appeals Bd.* (1979) 87 Cal. App.3d 996; *Midcal Aluminum, Inc. v. Rice, supra* (1979), 90 Cal.App.3d 979 affirmed as *California Liquor Dealers Assn. v. Midcal Aluminum, supra* (1980), 445 U.S. 97, all turn on the fact that the state was allowing the producer to fix *another's* price. The Court of Appeal in *Midcal, supra,* at pages 985-986 carefully pointed out that if price posting rather than price fixing were involved, no violation of the antitrust laws would result.

3. Conduct which otherwise might violate the Sherman Act is nonetheless proper if (1) the conduct is compelled by the state (2) as part of a regulatory scheme (3) where the state has supplemented free competition with regulation and the restraint is needed to make the act work. A statement of the doctrine is found in *New Motor Vehicle Board of California v. Fox* (1978) 439 U.S. 96, 109-111:

> "Appellees next contend that the Automobile Franchise Act conflicts with the Sherman Act, 15 U.S.C. § 1 et seq. They argue that by delaying the establishment of automobile dealerships whenever competing dealers protest, the state scheme gives effect to privately initiated restraints on trade and thus is invalid under *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951).
>
> "The dispositive answer is that the Automobile Franchise Act's regulatory scheme is a system of regulation, clearly articulated and affirmatively expressed, designed to displace unfettered business freedom in the matter of the establishment and relocation of automobile dealerships. The regulation is therefore outside the reach of the antitrust laws under the 'state action' exemption. *Parker v. Brown,* 317 U.S. 341 (1943); *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977). See

also *City of Layfayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978). *New Motor, supra,* 109.

". . . . . .

"Appellees also argue conflict with the Sherman Act because the Automobile Franchise Act permits auto dealers to invoke the state power for the purpose of restraining intrabrand competition. 'This is merely another way of stating that the . . . statute will have an anticompetitive effect. In this sense, there is a conflict between the statute and the central policy of the Sherman Act—'our charter of economic liberty.'" . . .

"Nevertheless, this sort of conflict cannot itself constitute a sufficient reason for invalidating the . . . statute. For if an adverse effect on competition were, in and of itself, enough to render a statute invalid, the States' power to engage in economic regulation would be effectively destroyed.' *Exxon Corp. v. Governor of Maryland,* 437 U.S. 117, 133 (1978)." (*New Motor, supra,* at 110-111.)

The main state interest is the prevention of price discrimination. The federal cases have long recognized: (a) that major purchasers can put pressure upon a seller for special treatment and (b) that local sales at prices below cost can be subsidized by sales at regular prices elsewhere to destroy the local competition. Subsequently, the local price can be raised again. This is known either as "predatory" pricing under section 1 of the Sherman Act or a Robinson Patman Act violation. (*Moore v. Mead's Fine Bread Co.* (1954) 348 U.S. 115; *Malcolm v. Marathan Oil Co.* (1981) 642 F.2d 845; *United States v. American Tobacco Co.* (1911) 221 U.S. 106, 160-161; *Standard Oil Co. v. United States* (1911) 221 U.S. 1, 42 & 43; Williamson, *Predatory Pricing* 87 Yale L.J. 284; Areeda & Turner, *Predatory Pricing* 88 Harv. L.J. 697.)

One example of an abusive trade practice that cannot be prevented without price posting is found in *AAA Liquors v. Joseph E. Seagram & Sons, Inc.* (10th Cir. 1982) ..... F2d ..... CCH 82-83 Trade Cases § 65,075. In *Seagrams* the Court upheld price discrimination against small retailers in the interest of allowing Seagrams to meet competition. Seagrams was thus able to give special allowances to be passed on only to large chains.

In a market for gum or shoes this would be perfectly proper. In a market like California's where liquor retailers are limited in their sources of supply and where entry is expensive and extensively delayed, such a policy would be catastrophic for small retailers.

The Court of Appeal decision here however, refused to apply the exemption on the ground that the state was insufficiently involved in setting the price (decision, p. 10-11). The approach is wrong. There is no need for the state to fix a price because *no wholesaler sets any price save its own.* There is no umbrella over an antitrust violation, only a compulsion upon a wholesaler to follow its very own prices.

Thus when we consider that posting also helps prevent predatory pricing and aids in pool buying by retailers, valid state purposes therefore exist that were utterly absent in *Midcal.*

In *Serline Wine & Spirit Merchants, Inc. v. Healy, supra,* 512 F.Supp. 936, for example, the Court stated at page 941, footnote 15:

> "The Court noted that 'Dealers who press sham protests before the New Motor Vehicle Board for the sole purpose of delaying the establishment of competing dealerships may be vunerable to suits under the federal antitrust laws.' [Citation omitted] 439 U.S. at 110 n. 15, 99 S.Ct. at 412 n. 15. This Court believes that what is really behind the Supreme Court's clear

> articulation and active supervision test announced in Midcal, to successfully invoke Parker protection, is the fear that 'a gauzy cloak of state involvement' only creates a 'sham' for 'what is essentially a private price fixing arrangement.'"
>
> "When the facts of *Midcal, Lafayette, Cantor* and *Goldfarb* are placed beside those of *Bates, Orrin* and *Parker* it is readily apparent that the Supreme Court saw the essential private, proprietary interest seeking to shield itself from liability—resulting in denying antitrust immunity and causing the creation of the two-pronged test in Midcal. The history of each case provides the best insight to the meaning of the legal test for Parker immunity and must not be viewed solely within the factual vacuum wherein it is announced."

(See also *George W. Cochran Co. v. Comptroller, Etc.* (Md. 1981) 437 A.2d 194, 198; *Estate of Effron* (1981) 117 Cal.App.3d 915, 921 et seq.) The distinction is also clear in *Seagram & Sons v. Hostetter* (1966) 384 U.S. 35 wherein a price affirmation statute, requiring the posting of prices, was upheld. The New York statute also required no deviation from those prices for the requisite period.

Just as the New York interest was held sufficient to justify limits upon competition, so also California's interest in preventing price discrimination is sufficient here and must be upheld.

In *Rice v. Norman Williams Co. supra,* ..... U.S. ..... [73 L.Ed.2d 1042] the majority stated:

> "A state statute is not preempted by the federal antitrust laws simply because the state scheme might have an anticompetitive effect. See, e.g., *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 439 U.S. 96, 110-111 (1978); *Exxon Corp. v. Governor of Maryland,*

437 U.S. 117, 129-134 (1978); *Seagram & Sons v. Hostetter*, 384 U.S. 35, 45-46 (1966).

"A party may successfully enjoin the enforcement of a state statute only if the statute on its face irreconcilably conflicts with federal antitrust policy. In *California Liquor Dealers v. Midcal Aluminum, Inc.* 445 U.S. 97 (1980), we examined a statute that required members of the California wine industry to file fair trade contracts or price schedules with the State, and provided that if a wine producer had not set prices through a fair trade contract, wholesalers *must* post a resale price schedule for that producer's brands. We held that the statute facially conflicted with the Sherman Act because it *mandated* resale price maintenance, an activity that has long been regarded as a per se violation of the Sherman Act. *Id.*, at 102-103; see *Dr. John Miles Medical Co. v. John D. Park & Sons Co.*, (1911) 220 U.S. 373, 407-409 [Emphasis by the court; fn. omitted.]

"By contrast, in *Seagram & Sons v. Hostetter, supra,* we rejected a facial attack upon § 9 of New York's Alcoholic Beverage Control Law, which required retailers and wholesalers to file monthly price schedules with the State Liquor Authority accompanied by an affirmation that the prices charged were no higher than the lowest price at which sales were made anywhere in the United States during the preceding month. *Id.*, at 29-40. The Court found no clear repugnancy between § 9 and the federal antitrust laws:

"'The bare compilation, without more, of price information of sales to wholesalers and retailers to support the affirmations filed with the State Liquor Authority would not of itself violate the Sherman Act. Section 9 imposes no irresistible economic pres-

> sure on the appellants to violate the Sherman Act in order to comply with the requirements of § 9. On the contrary, § 9 appears firmly anchored to the assumption that the Sherman Act will deter any attempts by the appellants to preserve their New York price level by conspiring to raise the prices at which liquor is sold elsewhere in the country. . . . Although it is possible to envision circumstances under which price discrimination prescribed by the Robinson-Patman Act might be compelled by § 9, the existence of such potential conflicts is entirely too speculative in the present posture of this case. . . .' *Id.*, at 45-46, . . . (citations omitted). [Fn. omitted.]"

> "Our decisions in this area instruct us, therefore, that a state statute, when considered in the abstract, may be condemned under the antitrust laws only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute. Such condemnation will follow under § 1 of the Sherman Act when the conduct contemplated by the statute is in all cases a per se violation. If the activity addressed by the statute does not fall into the category, and therefore must be analyzed under the rule of reason, the statute cannot be condemned in the abstract." (*Rice v. Norman Williams Co., supra,* 73 L.Ed. at 1049-1051.)

The major material difference between the majority and the concurring opinion is the view as to when a state statute is preempted by Sherman. The majority felt that a state statute will not be invalid absent a per se violation creating an irreconcilable conflict with Sherman. The majority envisioned however, that a *private* antitrust action might lie against *particular conduct* taken (fn. 8). For ex-

ample, one may refuse to deal with another. However, if the refusal to deal is based upon the refusal of the other party to accept illegal conditions, there is an antitrust violation. (*Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.* (9th Cir. 1969) 416 F.2d 71, 76-77.)

The minority however felt that on a sufficient showing of anticompetitive effect a state statute can be held invalid. The majority clearly felt to the contrary: anticompetitive effect is not enough regardless of the evidence, to invalidate a state statute that does not permit a per se violation.

We respectfully submit that the majority view in *Norman Williams* is the preferred public policy. Under it a state statute must clearly on its face allow or compel per se conduct to be rejected. It is an easy test to apply and recognizes the fact that most regulation lessens competition to some extent. It further recognizes the underlying basis of our federal system—that the states are also sovereign except when they clearly conflict with the Constitution or federal statutes.

Moreover, it leaves economic public policy in the hands of the elected representatives where it belongs. Historically, social progress was retarded in this country because courts used the "contracts," and "due process" clauses to determine for themselves the desirability of legislation. Only after a long struggle was the Holmes-Brandeis view accepted. This Court has recognized that caution must be utilized when dealing with mere economic issues to insure that the older practice is not revived in new garb.

This, however, is precisely what the *Lewis-Westco* decision and the test propounded by the concurring opinion in *Norman Williams* would do as it involves a subjective standard—does the anticompetitive effect outweigh a valid state interest. Consider the test in practice: a municipality often limits the number of taxi permits and regulates the price. Cities and counties engage in zoning. Under the

minority test, used by the California Court of Appeal in *Lewis-Westco*, it would be possible to litigate the questions of whether the anticompetitive effects outweigh the clearly valid purposes as a question of fact. The questions of whether a few more permits should be issued; whether taxi rates are a little too high; and whether a market should not be built on a vacant tract are often subjective in nature. Yet *Weinberger v. Salfi* (1975) 422 U.S. 749, 772-774 teaches that lines must be drawn somewhere even though they could as easily be drawn somewhere else.

The mere existence of similar and even identical wholesale prices does not mean that the prices are anticompetitive. Perfect competition can result in the same situation. (*Independent Iron Works, Inc. v. United States Steel Corp.* (9th Cir. 1963) 322 F.2d 656, 665; *United States v. Int. Harvester Co.* (1927) 274 U.S. 693, 708-709; *Joseph E. Seagram & Sons Inc. v. Hawaiian Oke & Liquors, Ltd., supra,* 416 F.2d at 84-85; *F.T.C. v. Lukens Steel Co.* (D.C. 1978) 454 F.Supp. 1182, 1190.) *Davidowitz v. San Diego Dental Society* (Cal. 1983) ..... F. Supp. ..... CCH 83 Trade Cases § 65,231 (Fact that others knew prices was not price fixing).

The above cases clearly establish that similar pricing without more is simply *insufficient* to find a Sherman Act violation. The *Lewis-Westco* decision followed *Rice v. Alcoholic Bev. Etc. Appeals Bd., supra,* 21 Cal.3d 431, however in drawing great inferences from the similarity. We fail to see similarity in pricing as economically or legally significant, especially since the purpose of price advertising and posting is to encourage competition, which will lead to price similarity.

Only the myopic would argue that price posting does not have some effect toward stabilizing the prices. The Legislature however has determined that prevention of price discrimination and protection of the small retailer from

bankruptcy—the past history of Standard Oil's business methods give ample support for the inference—justify the statute. This Court itself has very recently revitalized price discrimination and ruled that even a state can be guilty of it. *Jefferson County v. Abbott Labs* (1983) ..... U.S. ..... [51 U.S. Law Week 4195 (Feb. 23, 1983)].

REASONS FOR GRANTING THE WRIT

(a) The issue is novel in this Court in that while *California Liquor Dealers v. Midcal Aluminum* (1980) 445 U.S. 97 holds that per se vertical price fixing in the absence of sufficient state involvement and absent a legitimate state interest is invalid, this Court has also held that unless a state statute limiting competition is clearly preempted as a per se violation, it will not be held to violate the Sherman Act. *Rice v. Norman Williams Co.* (1982) ..... U.S. ..... [73 L.Ed.2d 1042]. Here the issue is whether a state system not permitting an explicit per se violation (since the wholesaler sets only its own price), having the purpose of preventing price discrimination and predatory pricing, is invalid because it tends to stabilize prices. Rule 17(c)

(b) The *Lewis-Westco* decision and a recent decision by a California United States District Court—*Enricos v. Rice, et al.*, (N. Dist. Cal. No. C 81-0068 EFL), are in direct conflict as *Enricos* upholds the very same statute from a Sherman based attack. See Appendix F.[2] Federal courts have upheld similar systems in other states. *Morgan v. Division of Liquor Control, Etc.* (2d Cir. 1981) 664 F.2d 353; *Fisher Foods, Inc. v. Ohio Dept. of Liquor Control* (Ohio 1982) ..... F.Supp. ..... CCH 82-83 Trade Cases § No. 65,156.

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[2]The Ninth Circuit has granted a motion for an interlocutory appeal. Appellant's brief has been filed in the Court of Appeals. Since the stay by this Court was denied, the Department is no longer enforcing price posting. If certiorari is denied here, *Enricos*

(c) The cases are in conflict as to the state action exemption. This decision and the Ninth Circuit differ from the Second and Seventh Circuits as to the true meaning of the state action exemption. In *Miller v. Oregon Liquor Control Com'n* (9th Cir. 1982) 688 F.2d 1222 and in *Knudsen Corp. v. Nevada State Dairy Commission* (9th Cir. 1982) 676 F.2d 374, state action has been defined to mean that the state must be involved in the actual setting of the prices charged. In contrast the Second Circuit held price *posting* satisfied the state action exemption in that the state had frequently debated the policy and mandated the postings. (*Morgan v. Division of Liquor Control, Etc., supra,* at 356.) In short, the meaning of "active state supervision" is a subject of conflict in the lower courts. We contend that where there is no per se violation the "active state supervision" requirement is satisfied by allowing competitive forces to work. It is illogical to force a state to choose between complete freedom or complete regulation of an area. It is much better to reconcile the two values by as little restraint as possible while allowing competition to exist. See for example *Town of Hallie v. City of EAU Clair* (7th Cir. 1983) ..... F.2d ..... CCH 83 Trade Cases § 65,227 (if private parties are not given power to control prices no active supervision required).

The issue was not addressed in *Midcal Aluminum, Inc.* in that the violation was per se and the California decision pointed out it was *not* a case where a wholesaler set only its own price (*Midcal Aluminum, Inc. v. Rice* (1979) 90 Cal.App.3d 979, 984-86.) See *Battipaglia v. New York State Liquor Authority* (NY 1982) CCH 82 Trade Cases § 64,964.

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will probably be dismissed as moot because it involves only injunctive relief. There is a case in State Court of Appeal in Los Angeles awaiting submission on price posting depending upon granting or denial of certiorari here. (*Mutual Wholesale v. Alcoholic Beverage Control Appeals Board*, 2 Civ. 64400)

In essence in contrast to *Midcal* price posting *inhibits* the power of wholesalers rather than granting extra economic power: they are forced to disclose their prices and cannot sell above or below them for the required period.

(d) There is a conflict between judicial interpretations of the Sherman Act and the First Amendment cases of this Court. *Lewis-Westco, supra,* and *Knudsen, supra,* proceed from the premise that publication of price information fosters price fixing. Yet this Court in *Va. Pharmacy Bd. v. Va. Consumer Council* (1976) 425 U.S. 748 stated that forbidding price advertising led to diminished price competition. (See also *Bates v. State Bar of Arizona* (1977) 433 U.S. 350 and *In re R.M.J.* (1982) 455 U.S. 191.) What then is the rule: Does price disclosure lead to price fixing or does it lead to price competition?

(e) Did Congress Intend To Allow State Liquor Statutes To Be Invalidated By A Commerce Clause Or Sherman Act Attack.

While the Court considered this issue in *Midcal* we think it misperceived the thrust of the argument. When the judicial and legislative history of state liquor regulation is considered, it is clear that Congress intended the Sherman Act to apply to private parties in the liquor business but did *not* intend its Commerce Power (and by inclusion the Sherman Act) to invalidate state mandated liquor regulation. The year the Sherman Act was enacted—1890—is the key. This Court held an Iowa liquor statute invalid as conflicting with the Commerce Clause. *Leisy v. Hardin* (1890) 135 U.S. 100.

In rapid response to this decision Congress passed the Wilson Act, 22 U.S.C. § 121, which withdrew Commerce Clause protection. When this Court subsequently limited state liquor legislation Congress passed the Webb-Kenyon

Act, 27 U.S.C. § 122, again removing Commerce Clause protection from liquor. Indeed the title of Webb-Kenyon makes it obvious that the intent was to *withdraw* Commerce Power.

How ironic then is the assumption that the Sherman Act —passed the same year as Congress withdrew its power over liquor and dependent itself upon the Commerce Clause for its validity—should be used to invalidate state regulatory systems.

The Wilson Act and Webb-Kenyon remain valid statutes today and should be followed. Moreover Congress in abolishing the fair trade exemption specifically stated, via the Senate Judiciary Committee, that liquor laws would not be affected. U.S. Code and Administrative News 1975, p. 1571.

Such a position would not give a blanket immunity to private parties—only to the extent that conduct is *compelled* by state law as part of a regulatory scheme would conduct be sheltered. Thus horizontal agreements to fix prices would still remain illegal.

The commerce power should not be used in light of clear legislative history, as in *United States Brewers v. Healey* (2d Cir. 1982) 692 F.2d 275, to strike down liquor price posting regulations.

(f) The Existence Of The 21st Amendment Should be Considered.

The issue can be framed simply: whereas the 21st amendment does not shield a state statute requiring what would otherwise be a per se violation where no substantial reason or interest is given for it (*Midcal*), does the 21st Amendment protect a state statute *not* allowing a per se violation—since each wholesaler binds only itself—where there *is* a substantial state interest. Whether analyzed in

terms of the state action exemption or the 21st Amendment, the result should be to uphold the statutory system at issue.

DATED: April 29, 1983

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Appendix A

In the Court of Appeal of the State of California

First Appellate District

Division One

1 Civil No. 54605 (AO 15668)

Lewis-Westco & Co.,
Petitioner,

vs.

Alcoholic Beverage Control Appeals Board,
Respondent.

Baxter Rice as Director of the
Department of Alcoholic Beverage Control,
Real Party In Interest.

[Filed Nov. 18, 1982]
Certified for Publication

By the Court:

The opinion filed on October 22, 1982, is modified as follows:

On page 6, lines 8 and 9 of footnote 6, the following words have been deleted: analysis of the statute under the "rule of reason." In their place has been inserted: proceedings.

The petitions for rehearing are denied.

Dated: Nov. 18, 1982.

/s/ RACANELLI
Presiding Justice

In the Court of Appeal of the State of California

First Appellate District

Division One

1 Civil No. 54605 (AO 15668)

Lewis-Westco & Co.,
Petitioner,

vs.

Alcoholic Beverage Control Appeals Board,
Respondent.

Baxter Rice as Director of the
Department of Alcoholic Beverage Control,
Real Party In Interest.

[Filed Nov. 2, 1982]
Certified for Publication

By the Court:

The opinion filed on October 22, 1982, is modified as follows:

On page 16, last line of the first paragraph after manufacturers] has been added but see United States v. United States Gypsum Co. (1978) 438 U.S. 422, which substantially restricts such limited price exchange practice.

Dated: Nov. 2, 1982

/s/ RACANELLI

Presiding Justice

In the Court of Appeal of the State of California

First Appellate District

Division One

1 Civil No. 54605 (AO 15668)

Lewis-Westco & Co.,
Petitioner,

vs.

Alcoholic Beverage Control Appeals Board,
Respondent.

Baxter Rice as Director of the
Department of Alcoholic Beverage Control,
Real Party In Interest.

[Filed Oct. 22, 1982]
Certified for Publication

Section 24756 of the Business and Professions Code (to which all section references apply unless otherwise noted) requires every manufacturer, rectifier and wholesaler of distilled spirts to file and maintain with the Department of Alcoholic Beverage Control (Department) a written price list reflecting sales prices to retailers and to sell to retailers in compliance with the posted price list.[1]

In this extraordinary writ proceeding under section 23090, we consider the validity of the price posting statute

[1]Section 24756 provides: "Every distilled spirits manufacturer, brandy manufacturer, rectifier, and wholesaler shall file and maintain with the department a price list showing the prices at which distilled spirits are sold to retailers by the licensee. . . . Sales of distilled spirits to retailers by each distilled spirits manufacturer, brandy manufacturer, rectifier, and wholesaler shall be made in compliance with the price list of the licensee on file with the department."

and the promulgated implementing regulations (Cal. Admin. Code, tit. 4, § 100) in light of *Rice v. Alcoholic Bev. etc. Appeals Bd.* (1978) 21 Cal.3d 431, which struck down companion retail price maintenance provisions and regulations determined to be in fatal conflict with the provisions of Sherman Antitrust Act, 15 U.S.C. section 1 et seq. For the reasons which we explain, we will conclude that the price posting provisions contained in section 24756, and implementing rule, are likewise invalid.[2]

The facts are undisputed. On or about July 26, 1979, petitioner, a licensed rectifier of distilled spirits, sold its products to five separate retailers at prices or quantity discounts other than as contained in price or quantity discount schedules on file with the Department in violation of section 24756 and Rule 100. The Department suspended petitioner's license for 10 days as to each count, stayed upon stated conditions. On appeal to the Alcoholic Beverage Control Appeals Board (Board), petitioner challenged the Department's order contending that Rule 100 is invalid under *Rice*, the Sherman Act, the Robinson-Patman Act (15 U.S.C.A. § 13 et seq.) and the equal protection clause. In its written opinion affirming the deci-

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[2]Under the relevant provisions of existing Rule 100, the licensed seller or distributor of distilled spirits must file a written price schedule showing the sales price per case and the discounts offered (subd. a); the required monthly price and quantity discount schedules must be filed on or before the 15th day of the month preceding the effective date (subd. b(1)); a licensee can meet competitive prices on similar distilled spirits of a "competitive brand" (defined under subd. b(4) as a similar brand of spirits involving a price change within the range of $3 per case of the price posted by a competing licensee) by amendment to the posted price schedule lowering prices or increasing quantity discounts provided that a competitive quantity discount may not reduce the net price of the brand, type or size container below that of the competing brand for the same quantity (subd. f); multiple brand discounts are permitted only for

sion of the Department, the Board concluded that although the price posting statute and Department rule constituted an invalid price fixing scheme under the rationale of *Rice v. Alcoholic Bev. etc. Appeals Bd.*, supra, 21 Cal.3d 431, and *Midcal Aluminum, Inc. v. Rice* (1979) 90 Cal.App.3d 979, affirmed sub nom *California Liquor Dealers v. Midcal Aluminum* (1980) 445 U.S. 97, it was nevertheless prohibited from declaring the statute unconstitutional under the provisions of California Constitution, article III, section 3.5,[3] and consequently refrained from determining the validity of the derivative rule as an "idle act."

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assorted brands owned or controlled by the same person (subd. g); and a licensee is prohibited from advertising or offering to sell his products at a price or quantity discount other than as provided in the posted price schedules or amendments (subd. k). (Petitioner's violations were apparently grounded on its inability to post quantity discounts for assorted brands owned by more than one person.)

While we shall make only limited references to Rule 100, our conclusions concerning the validity of the enabling statute will equally apply to the subordinate rule. (Cf. *Rice v. Alcoholic Bev. etc. Appeals Bd., supra,* 21 Cal.3d at p. 436.)

[3]Section 3.5 provides: "An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power: [¶] (a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional; [¶] (b) To declare a statute unconstitutional; [¶] (c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations."

Petitioner now renews its challenges below seeking to annul the order of the Board.[4]

Preliminary to our discussion of the merits, we review the recent line of decisions which have considered California's price maintenance legislation for alcoholic beverages. In its benchmark decision, the California Supreme Court held that the price maintenance provisions embodied in former section 24755 (repealed by Stats. 1980, ch. 1368, § 3) which required distilled liquors wholesalers to set minimum retail prices constituted a violation of the Sherman Act neither shielded by the "state action" exception nor saved by application of the Twenty-First Amendment of the United States Constitution. (*Rice v. Alcoholic Bev. etc. Appeals Bd., supra,* 21 Cal.3d 431, 444-459.) Thereafter, in reliance on the *Rice* analysis, state courts uniformly have invalidated related price maintenance and regulatory provisions. (See *Capiscean Corp. v. Alcoholic Bev. etc. Appeals Bd.* (1979) 87 Cal.App.3d 996 [price fixing in retail sale of wine]; *Midcal Aluminum, Inc. v. Rice, supra,* 90 Cal.App.3d 979[5] [price maintenance provisions for wholesale and retail sale of wine]; *Norman Williams Co. v. Rice* (1980) 108 Cal.App.3d 348 [designation statute] reversed and remanded in *Rice v. Norman Williams Co.* (1982) ..... U.S. ..... [73 L.Ed.2d 1042].)

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[4]California Beer Wholesalers Association, a trade association of beer wholesalers, and Wine and Spirits Wholesalers of California, an association of wholesalers of distilled spirits, also sought review. Since the former made no effort to intervene below, and the latter was denied the right to intervene, neither has standing herein. (Cf. *Rice v. Alcoholic Bev. etc. Appeals Bd., supra,* 21 Cal.3d at p. 436, fn. 4.) Thus, while we deny the petitions to intervene, we consider the briefs previously filed as amicus curiae.

[5]Following issuance of its writ of certiorari upon a petition in intervention, the United States Supreme Court rendered its opinion affirming the *Midcal* decision based entirely on the reasoning advanced in *Rice* (*California Liquor Dealers v. Midcal Aluminum, supra,* 445 U.S. 97, 100-101, 112-114).

Petitioner argues that *Rice v. Alcoholic Bev. etc. Appeals Bd., supra*, squarely controls the issue herein; that since section 24756 sanctions horizontal price fixing among liquor wholesalers, it likewise must fall as an inseparable part of the price maintenance structure considered in *Rice*. Respondents counter that neither *Rice* nor its progeny apply herein since those decisions construed legislation dealing with vertical and horizontal price fixing as distinguished from "price posting" by licensed wholesalers. Accordingly, we consider the reasoning in *Rice* and related precedents in order to determine whether the challenged statute violates the Sherman Act and, if so, whether antitrust immunity is afforded either under the "state action" exception announced in *Parker v. Brown* (1943) 317 U.S. 341, or by reason of the application of the Twenty-First Amendment. (See *Rice v. Alcoholic Bev. etc. Appeals Bd., supra*, 21 Cal.3d 432 at pp. 439-451; see also *Rice v. Norman Williams Co., supra*, ... U.S. ..... [73 L.Ed.2d 1042];[6] *California Liquor Dealers v. Midcal Aluminum, supra*, 445 U.S. 97, 102-110.)

It is well established that price fixing alone is illegal per se because it eliminates one form of competition. (*United States v. Univis Lens Co.* (1942) 316 U.S. 241, 252; *United States v. Trenton Potteries* (1927) 273 U.S.

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[6]We reject the claim advanced by respondents and amicus that *Norman Williams Co.* implicitly restricted—if not repudiated—the holding in *Rice*. The majority in *Norman Williams Co.*, after distinguishing *California Liquor Dealers v. Midcal Aluminum, Inc., supra*, dealing with a mandatory resale price maintenance activity, found no similar per se facial conflict with the Sherman Act and accordingly remanded to the California appellate court for further analysis of the statute under the "rule of reason." (73 L.Ed.2d at p. 1052.) (Cf. *Miller v. Oregon Liquor Control Com'n* (9th Cir. 1982) ..... F.2d ..... (No. 80-3376, July 7, 1982) [reversing finding of antitrust exception of Oregon wholesale price posting regulations on grounds of insufficient active state supervision and remanding for further proceedings relating to Sherman Act compliance and balancing of competing interests under *Midcal Aluminum*].)

392, 397.) It is equally settled that "any combination which tampers with the price structure is unlawful. Although the participants of a price fixing scheme may be in no position to control the market, to the extent that they raise, lower or *stabilize* prices they violate the act, and this is so even if the prices fixed are reasonable. [Citations.]" (*Rice v. Alcoholic Bev. etc. Appeals Bd., supra*, 21 Cal.3d at p. 453-454; emphasis added.) But in determining that the imposition of retail prices by producers constituted a clear violation of federal law (*Rice v. Alcoholic Bev. etc. Appeals Bd., supra*, 21 Cal.3d 431, 454-456), the court focused its inquiry upon the *effect* of the statutory pricing scheme rather than its form reasoning that former section 24755 "has the effect not only of allowing illegal vertical restraints on competition—i.e., resale prices specified by producers and imposed upon retailers—but horizontal restraints as well." (*Id.* at p. 454.) In view of the statistical evidence there presented reflecting a gradual and marked reduction in price differentials among liquors of the same type, the court determined that the statute clearly violated Sherman Act policy reasoning in part: "However, that there may be some interbrand competition does not detract from the circumstance that among leading brands there is a uniformity of price which persuasively demonstrates the absence of 'free and unfettered competition' in the California liquor industry. Indeed, the posting system facilitates price fixing among producers. While it may be a per se violation of the Sherman Act for competitors to exchange price information on a regular basis (*United States v. Container Corp.* (1969) 393 U.S. 333, 336-337 [21 L.Ed.2d 526, 529-530, 89 S.Ct. 510]), producers may readily determine the prices charged by their competitors by referring to the prices filed with the department or to industry publications listing the posted prices. (Cal. Admin. Code, tit. 4, § 99.2, subd. (b)(2).)" (*Rice v. Alcoholic Bev. etc. Appeals Bd., supra*, 21 Cal.3d at pp. 455-456.)

Thus, contrary to respondents' assertion that the *Rice* analysis is limited to vertical price fixing arrangements alone, the court underscored the anti-competitive *effect* resulting from the posting system's facilitation of price fixing among producers as an impermissible restraint of trade in violation of Sherman Act policy.[7]

Under the challenged statute, licensed wholesalers are required to announce their prices in advance by posting them with the Department and, under sanction of penalty, are prevented from making sales to retailers at different prices. Although in form a price posting regulation, it is not immune from antitrust analysis under *Rice* in order to determine whether an illegal price fixing restraint is otherwise manifested. Here, as in *Rice*, petitioner introduced statistical evidence demonstrating a progressive elimination of price variations between wholesalers selling the same brand and competing brands.[8] Moreover, as the

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[7]Respondents' parallel argument, relying on *Ralphs Grocery Co. v. Reimel* (1968) 69 Cal.2d 172, that price posting is inherently distinguishable from price fixing is unpersuasive. First, as discussed, the mere definitive distinction does not eliminate the possibility that price posting legislation may in fact facilitate illegal price fixing. Secondly, *Ralphs Grocery* decided before the repeal of the Miller-Tydings Act and McGuire Act is of limited precedential significance in light of the subsequent *Rice* holding.

[8]For *inter*brand competition, in 1955, per case prices of the leading gins varied $2.71 per case or approximately 7 percent. In 1975, the difference per case between the highest and lowest leading gin was a single cent. During that same period the case price of bourbons, excluding Ten High, narrowed from $13.47 (14%) variance to $.47 (1%). The leading scotch whiskeys went from a $.50 per case variance equal to 9/10 percent to $.29 per case variance or 3/10 percent.

For *intra*brand competition, with one exception, every wholesaler who sold one of the leading brands of gin, scotch whiskey or straight whiskey charged the same per case price as his competitors.

Additionally, during the 15-month period prior to the hearing, there were only two instances where the price of one of the ana-

Board concluded, subdivision (f) of the implementing rule literally "invites periodic examination of the price lists on file" thus assuring other competitors that the filing licensee will not sell its products to anyone at a lower price. In plain effect, the mandated price posting, coupled with the regulatory compliance condition, openly sanctions and promotes an exchange of price information among competitors calculated to produce a uniform price structure vividly demonstrating the absence of free and unfettered competition in the wholesale liquor industry. (See *Rice v. Alcoholic Bev. etc. Appeals Bd., supra,* 21 Cal.3d at pp. 455-456.) The pernicious effect of the statutory scheme in promoting horizontal price restraints is the same whether applied to wholesale or retail price maintenance provisions; price fixing at either level is violative of the Sherman Act. (See *Midcal Aluminum, Inc., supra,* 90 Cal.App. 3d at p. 983.[9]

Accordingly, we conclude that section 24756 suffers from the same infirmity as the wholesale price posting requirements examined in *Midcal*. Consequently, the price posting statute must be declared invalid as an illegal restraint of

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lyzed brands was reduced: In November and December 1979, John Walker Red and Gordon's Gin were reduced in price; during those two months every wholesaler in Northern California who handled that brand made the exact same price reduction. The following January, each increased his price to the same amount charged by their competitors.

[9]We agree with the Board's determination that the semantical distinction between a "price schedule" and "price list" noted in *Midcal* at page 985, is dictum at best. However labeled, it is the price posting system that facilitates illegal price fixing that is central to our inquiry. (*Rice v. Alcoholic Bev. etc. Appeals Bd., supra,* 21 Cal.3d at p. 455.) Additionally, we observe that the Department itself equates the statutory term with "price schedules," the designation consistently employed in the implementing rule.

trade in the absence of state action exemption or constitutional protection.

Whether antitrust immunity is conferred on the price posting scheme under the doctrine of *Parker v. Brown, supra,* 317 U.S. 341, rests upon a determination of compliance with governing standards: first, that the challenged restraint must be clearly articulated and affirmatively expressed as state policy; second, the policy must be "actively supervised" by the state itself. (*California Liquor Dealers v. Midcal Aluminum, supra,* 445 U.S. 97, 105.) Assuming arguendo that the statutory scheme unmistakably evidences a clear legislative policy sanctioning wholesale price maintenance in satisfaction of the first prong, no similar compliance with the second prong requiring active state involvement is demonstrated. The observations of our highest federal court in its critique of a parallel California statute is aptly instructive: "[T]he State simply authorizes price-setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in any 'pointed reexamination' of the program. The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price fixing arrangement." (*Id,* 105-106; see also *Rice v. Alcoholic Bev. etc. Appeals Bd.,* supra, 21 Cal.3d 431, 445, fn. omitted.)

As petitioners correctly argues, active state involvement is as absent here as it was under the resale price maintenance program invalidated in *Rice.* Under both statutory programs, as the Board found, the state neither established its own pricing scheme nor reviewed the reasonableness of the prices set by others. The state merely provides, at public expense, a facility for the exchange of wholesale

price information among competitors resulting in a uniform price structure, a practice which stifles rather than promotes free competition. In the absence of active supervision or "pointed re-examination" by the state itself to insure that Sherman Act policies are not unnecessarily subordinated (*Rice v. Alcoholic Bev. etc. Appeal Bd., supra,* 21 Cal.3d 431, 445), no antitrust immunity is extended. Nor do we comprehend the Department's insistent claim that it is the individual wholesaler who sets his own prices rather than the state or others. It is the very existence of an essentially private price fixing arrangement under statutory sanction which is repugnant to Sherman Act policies. As long declared: " 'a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action was lawful. . . .' " (*California Liquor Dealers v. Midcal Aluminum, supra,* 445 U.S. 97, 104, 106 [quoting *Parker v. Brown, supra,* 317 U.S. at p. 351].)

We next consider whether section 2 of the Twenty-First Amendment of the United States Constitution[10] insulates the challenged statute from Sherman Act compliance, a contention rejected by the Board for the reasons stated in *Rice* and *Midcal.* We are similarly persuaded.

Whether the statutory scheme may be sustained under the protection of the Twenty-First Amendment requires a balancing process in order to determine what policies are furthered by the statute, whether the price posting provisions clearly vindicate those policies, and whether and to what degree the Sherman Act policy is undermined by that statutory program. (*Rice v. Alcoholic Bev. etc. Appeals Bd., supra,* 21 Cal.3d at p. 451.) Although the Amend-

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[10]Section 2 provides: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

ment grants to states virtually complete control in regulating the sale of liquor and structuring in liquor distribution system, such control is not absolute and remains subject to overriding federal interest in the regulation of interstate commerce. "The competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a 'concrete case.' [Citation.]" (*California Liquor Dealers v. Midcal Aluminum, supra,* 445 U.S. 97, 110.) We believe that the *Rice* rationale relating to the state's interest in retail price maintenance provisions is equally applicable and controlling in the context of a wholesale price posting program. Both sections were enacted as a part of Chapter 10 of the Alcoholic Beverage Control Act for the same legislative purposes: to promote temperance and orderly marketing conditions (§§ 24749, 23001; *Rice v. Alcoholic Bev. etc. Appeals Bd., supra,* p. 451.)[11]

By analogy to *Rice* we similarly find no compelling justification for the horizontal restraints created by the wholesale price posting statute which tend to eliminate

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[11]We reject respondents' contention that the challenged statute was enacted to prevent price discrimination proscribed by section 25503, subdivision (e), thus justifying the anti-competitive effect of the price posting program. The price discrimination measure, enacted after section 24756, is found in an entirely different chapter (15) of the Alcoholic Beverage Control Act for the wholly different purpose of maintaining the independence of the tripartite levels of distribution provided under the Act. (See *California Beer Wholesalers Assn, Inc. v. Alcoholic Bev. etc. Appeals Bd.* (1971) 5 Cal.3d 402, 407-412.) Nor do we find the holding in *Schenley Affiliated Brands Corp. v. Kirby* (1971) 21 Cal.App.3d 177, applicable as contended. *Schenley,* which then assumed the validity of price fixing legislation, dealt with an earlier version of Rule 100 concerning the types of permitted assortments by wholesalers and the prohibition of "tie-in" sales for discount purposes; there is no suggestion in *Schenley* that section 24756 was intended either to implement or supplant section 25503.

free competition. There is no showing that price posting actually protects small retailers. Indeed, the studies considered in *Rice* suggest that price posting provides the small retailer with little protection, if any, from discriminatory pricing practices at the wholesale level. Conversely, there is no reason to assume that price posting is necessary to the effective policing of discriminatory price practices under the provisions of the Robinson-Patman Act. As earlier discussed, there is eloquent proof that price posting actually results in serious impairment of price competition in the wholesale liquor industry. While it is arguable that price posting may provide useful information to the consumer retailer who might otherwise be subject to predatory practices, it seems clear that it is only in a noncompetitive setting that the protection of wholesale price posting would even be required. Ironically, it is the price posting scheme *itself* which tends to create a noncompetitive environment which would conceivably justify whatever protection is afforded the retailer through such accessible information. In convoluted result, the price posting statute provides a remedy for an ailment which it itself creates.

Finally, it is doubtful whether the small retailer would gain any competitive advantage through the posting of quantity discounts which as a practical matter would be available only to larger retailers. Nor does the circumstance that the narrowing of prices to lower levels thus minimizing the burden imposed upon retails justify the anticompetitive effect of price posting. To reiterate, the major economic premise underlying the Sherman Act is the promotion of free competition; any restraint on trade which *raises, lowers or stabilizes prices,* is prohibited. (*United States v. Socony-Vacuum Oil Co.* (1940) 310 U.S. 150, 222.)

Nor is it reasonable to conclude that the wholesale price posting program is likely to promote temperance. (See

Rice v. Alcoholic Bev. etc. Appeals Bd., supra, 21 Cal.3d 431, pp. 457-459.) Again, it is conjectural at best whether the anticompetitive effect of price posting would trigger higher wholesale prices and consequent higher retail prices so as to cause a perceptible decrease in consumption demands. As *Rice* teaches, there is little evidence to suggest that price maintenance legislation significantly contributes to reduced consumption of alcohol. (*Id.*, at p. 457.) Such doubtful benefit is inadequate to override the significant objectives of the Sherman Act (*California Liquor Dealers v. Midcal Aluminum, supra,* 445 U.S. 97, 114; *Rice, supra,* p. 458.)

Moreover, alternative means to accommodate state concerns compatible with the objectives of the Sherman Act could be readily fashioned. Obviously, the establishment of a truly competitive market, permitting access to retailers of independent wholesale prices, would enable purchases at the best possible price. Additionally, a more limited exchange of presale price information among wholesalers arguably would result in minimal anticompetive effects within the industry while providing wholesalers and retailer with adequate price information without risk of predatory price practices. Such limited exchange in order to further adherence to the Robinson-Patman Act would appear consonant with Sherman Act precepts. (See e.g., *Wall Products Co. v. National Gypsum Co.* (N.D.Cal. 1971) 326 F.Supp. 295 [permissible price *verification* among gypsum manufacturers].)

In conclusion, we hold that consideration of the relevant balancing factors compels a determination that the policies underlying the Sherman Act are paramount and that the price posting scheme embodied in section 24756 and the implementing rule are invalid. (*California Liquor Dealers v. Midcal Aluminum, supra,* 445 U.S. 97, 114; *Rice v. Alcoholic Bev. etc. Appeals Bd., supra,* 21 Cal.3d 431, p. 459.)

In view of our determination, we need not reach the remaining issues raised in the briefs.[12]

The order of the Board below is annulled. The petitions to intervene as real parties are dismissed.

Certified for publication

/s/ RACANELLI
Racanelli, P.J.

We concur:

/s/ ELKINGTON
Elkington, J.

/s/ NEWSOM
Newsom, J.

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[12]While it is unnecessary to discuss the question of the Board's authority to declare the subject statute unenforceable by reason of the restrictions imposed under California Constitution, article III, section 3.5, we assume, arguendo, that the explicit constitutional language would prohibit such an administrative adjudication as determined below. However, we agree with the Board that, as a general proposition, such prohibition on constitutional grounds would not affect an administrative agency's power in the enforcement of its own rules. (See *Goldin v. Public Utilities Commission* (1979) 23 Cal.3d 638, 669, fn. 18.)

Appendix B

Before the Alcoholic Beverage Control Appeals Board
of the State of California

AB-4877

File No. 48292; Reg. 12952

ALJ: Philip Sarkisian (f:c)

Date and Place of Hearing:
September 3, 1981
350 McAllister Street
San Francisco, CA

Appearances on Appeal:
For Department:
Hon. George Deukmejian
Attorney General
Matthew Boyle
Deputy Attorney General

For Appellant:
Daniel Leraul, Attorney

In the Matter of the Accusation Against:
LEWIS WESTCO AND COMPANY
3003 Third Street
San Francisco, CA 94107
Licenses: still, rectifier, beer and wine importer,
distilled spirits importer,
and beer and wine wholesaler
Under the Alcoholic Beverage Control Act.

[Filed Dec. 17, 1981]

Lewis Westco and Company has appealed a decision of the Department of Alcoholic Beverage Control which determined that the licensee violated Business and Professions Code 24756 and § 100, Title IV of the California Administrative Code as to each of Counts I, II, III, IV and V.

That because thereof, grounds for discipline exist as to each count pursuant to Business and Professions Code § 24200, subdivisions (a) and (b), and § 22 of Article XX of the California Constitution. The department further determined:

> "1. Respondent has challenged the validity and enforceability of rule 100 on various grounds. Section 3.5 of article III of the California Constitution provides as follows:
>
> "'Section 3.5. An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:
>
> (a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;
>
> (b) To declare a statute unconstitutional;
>
> (c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.'"

"This provision of the California Constitution prohibits the Department of Alcoholic Beverage Control from declaring rule 100 invalid. For this reason, respondent's objections to the validity of rule 100 are overruled."

Because of the above violations, the department ordered that appellant's license be suspended for 10 days as to each count; provided, however, that execution of the suspension shall be stayed upon the condition that no subsequent cause for disciplinary action occur within one year from the effective date of the department's decision. It was further ordered that the suspensions shall run concurrently.

The department's decision further provides:

"Findings of Fact:

"I

"Count I

"On or about July 26, 1979, the above-named rectifier did sell distilled spirits to B. T. DeGeorge, dba Say Cheese, 1118 Meridian Road, San Jose, an off-sale general retail licensee, at a price or quantity discount other than the price or quantity discount contained in price or quantity discount schedules on file with the Department of Alcoholic Beverage Control, to-wit:

	Posted Discount Per Case	Discount Allowed Per Case On Invoice # 19222
(a) Two cases of Seagram's V. O. Canadian Whisky, 86.8 proof, quart bottles, 6 years old	0	$5.00
(b) One case of Seagram's V. O. Canadian Whisky, 86.8 proof, 1.75 liter bottles, 6 years old	0	5.00
(c) One case of Canadian Club Canadian Whisky, 86.8 proof, 1.75 liter bottles, 6 years old	0	5.00
(d) Two cases of Ron Bacardi Superior Puerto Rican Rum (silver label), 80 proof, 1.75 liter bottles	0	8.00
(e) One case of Kahlua, Mexican Coffee Liqueur, 53 proof, 23 oz. size bottles	0	5.00
(f) One case of Johnnie Walker Red Label, Scotch Whisky, 86.8 proof, 750 ml. size bottles	0	5.00
(g) One case of Grand Marnier, Liqueur, 80 proof, 23 oz. size bottles	0	5.00
(h) One case of Seagram's Crown Royale, Canadian Whisky, 80 proof, quart size bottles	0	5.00

in violation of section 24756 of the Business and Professions Code, State of California, and rule 100, title 4, California Administrative Code.

"II

"Count II

"On or about July 26, 1979, the above-named rectifier did sell distilled spirits to Leland R. and Sally C. Chew, dba South Shore Liquors, 549 W. Plaza, Alameda, an off-sale general retail licensee, at a price or quantity discount other than the price or quantity discount contained in price or quantity discount schedules on file with the Department of Alcoholic Beverage Control, to-wit:

	Posted Discount Per Case	Discount Allowed Per Case On Invoice # 19226
(a) Four cases of J & B Scotch Whisky, 86 proof, 750 ml. size bottles	0	$5.00
(b) One case of Ron Bacardi Superior Puerto Rican Rum (Silver Label), 80 proof, 1.75 liter bottles	0	8.00
(c) Two cases of Kahlua, Mexican Coffee Liqueur, 53 proof, 23 oz. size bottles	0	5.00
(d) One case of Johnnie Walker Red Label Scotch Whisky, 86.8 proof, 750 ml. size bottles	0	5.00
(e) One case of Johnnie Walker Red Label Scotch Whisky, 86.8 proof, quart size bottles	0	5.00
(f) One case of Jim Beam Kentucky Straight Bourbon Whiskey, 80 proof, 750 ml. size bottles	0	5.00
(g) One case of Jim Beam Kentucky Straight Bourbon Whiskey, 80 proof, 1.75 liter size bottles	0	5.00

in violation of section 24756 of the Business and Professions Code, State of California, and rule 100, title 4, California Administrative Code.

"III

"Count III

"On or about July 26, 1979, the above-named rectifier did sell distilled spirits to Best Buy Bottles, Inc., 6111 Meridian Avenue, San Jose, an off-sale general retail licensee, at a price or quantity discount other than the price or quantity discount contained in price or quantity discount schedules on file with the Department of Alcoholic Beverage Control, to-wit:

	Posted Discount Per Case	Discount Allowed Per Case On Invoice # 19219
(a) Three cases of J & B Scotch Whisky, 86 proof, 750 ml. size bottles	0	$5.00
(b) Three cases of Canadian Club, Imported Canadian Whisky, 86.8 proof, 750 ml. size bottles	0	5.00
(c) Two cases of Jim Beam, Kentucky Straight Bouborn Whiskey, 80 proof, 750 ml. size bottles	0	5.00
(d) One case of Johnnie Walker Red Label, Scotch Whisky, 86.8 proof, 750 ml. size bottles	0	5.00
(e) Two cases of Wild Turkey, Straight Bourbon Whiskey, 101 proof, 750 ml. size bottles	0	5.00
(f) One case Johnnie Walker Black Label, Scotch Whisky, 86.8 proof, 750 ml. size bottles	0	5.00

in violation of section 24756 of the Business and Professions Code, State of California, and rule 100, title 4, California Administrative Code.

"IV

"Count IV

"On or about July 26, 1979, the above-named rectifier did sell distilled spirits to M. Beacon & A. Domingo, dba Village Bottle Shop—R.C., 504 El Camino Real, Redwood City, an off-sale general retail licensee, at a price or quantity discount other than the price or quantity discount contained in price or quantity discount schedules on file with the Department of Alcoholic Beverage Control, to-wit:

	Posted Discount Per Case	Discount Allowed Per Case On Invoice # 19221
(a) Six cases of Kahlua, Mexican Coffee Liqueur, 53 proof, 23 oz. size bottles	0	$5.00
(b) Two cases of Grand Marnier, Liqueur, 80 proof, 23 oz. size bottles	0	5.00
(c) Two cases of Jim Beam, Kentucky Straight Bourbon Whiskey, 80 proof, 1.75 liter size bottles	0	5.00
(d) Two cases of Jim Beam, Kentucky Straight Bourbon Whiskey, 80 proof, 750 ml. size bottles	0	5.00
(e) Two cases Seagram's V. O. Canadian Whisky, 86.8 proof, 1.75 liter size bottles	0	5.00

in violation of section 24756 of the Business and Professions Code, State of California, and rule 100, title 4, California Administrative Code.

"V

"Count V

"On or about July 26, 1979, the above-named rectifier did sell distilled spirits to Erika and John Davis, dba Skyline Bottle Shop, 11893 Skyline Boulevard, Oakland, an off-sale general retail licensee, at a price or quantity discount other than the price or quantity discount contained in price or quantity discount schedules on file with the Department of Alcoholic Beverage Control, to-wit:

	Posted Discount Per Case	Discount Allowed Per Case On Invoice # 19214
(a) One case of J & B Scotch Whisky, 86 proof, 750 ml. size bottles	0	$5.00
(b) One case of Liquore Galliano, Liqueur, 70 proof, 23 oz. size bottles	0	5.00
(c) Three cases of Kahlua, Mexican Coffee Liqueur, 53 proof, 23 oz. size bottles	0	5.00
(d) One case of Hennessy Bras Arms, Cognac V.S., 80 proof, 750 ml. size bottles	0	5.00
(e) One case of Johnnie Walker Red Label, Scotch Whisky, 86.8 proof, 750 ml. size bottles	0	5.00
(f) One case of Johnnie Walker Black Label, Scotch Whisky, 86.8 proof, 750 ml. size bottles	0	5.00
(g) Five cases of Seagram's V.O. Canadian Whisky, 86.8 proof, quart size bottles	0	5.00

in violation of section 24756 of the Business and Professions Code, State of California, and rule 100, title 4, California Administrative Code.

"VI

"Respondent has been licensed as indicated above since April 26, 1965. There is no record of any disciplinary action against the respondent."

This appeal is based on the grounds that the Department of Alcoholic Beverage Control proceeded in excess of its jurisdiction and that it did not proceed in the manner required by law.

At the department hearing, evidence (invoices of sales) was presented by the department in support of the violations set forth in the accusation that the licensee herein did sell distilled spirits to designated retail licensees at a price or quantity discount other than the price or quantity discount contained in price or quantity discount schedules on file with the Department of ABC (Department's Exhibits 1 through 5).

The facts of this case are not in dispute on appeal.

Appellant does, however, raise the following legal issues:

Article III, § 3.5 of the California Constitution only limits the department's authority to review the validity of statutes and does not alter the department's duty to review the validity of a department rule (100).

Rule 100 is invalid because it is based upon a statute found by the Supreme Court to be invalid.

Rule 100 is invalid because it conflicts with numerous precedent legal principles: (a) Rule 100 violates federal anti-trust policy by requiring disclosure of future price information which tends to eliminate price competition; (b) Rule 100 is invalid because it sponsors illegal tying of products in restraint of trade; (c) Rule 100 is invalid because it sponsors price discrimination, which violates the Robinson Patman Act.

"Rule 100 exceeds the department's authority because it fixes prices and thereby eliminates price competition for 60-day periods.

"Rule 100 is invalid because the Department of ABC has no authority to control assortments, other than California Brandy.

> "Rule 100 is invalid because it denies equal protection to smaller wholesalers and distillers and creates an arbitrary classification unrelated to any legitimate interest of the state."

Ruling on Petition for Intervention

Wine and Spirits Wholesalers of California, a California corporation, which allegedly consists of members who sell over 80 percent of the distilled spirits sold to the retailers of California, and who claim to be directly affected by instant litigation, have filed a Petition for Intervention as a party with the board in this matter.

Article XX, § 22 of the California Constitution states "When any person aggrieved from a decision of the department . . .", while Business and Professions Code § 23081 refers to ". . . Any party aggrieved by a final decision of the department may file an appeal with the board from such decision." In addition, § 194, Title 4 of the California Administrative Code recites: "Permission to file briefs by persons other than the parties to the appeal may be granted upon written request."

In seeking resolution of the issue, consideration is also given to the holding by the California Supreme Court in *Rice v. Alcoholic Beverage Control Appeals Board and Corsetti,* 21 Cal.3d 431, 436 (fn. 4), as to those who sought to intervene in the review of a board decision before that court. It stated:

> "Youngs Market Company and other wholesale distributors of alcoholic beverages (Young's) also sought review. However, their petition must be denied because they were not parties to the proceedings before the board.
>
> Under Article XX, § 22, of the California Constitution, orders of the board are subject to judicial review "upon petition of . . . any party aggrieved by such

> order." Section 23090 allows "any person" affected by a final order of the board to apply for a writ of review. However, § 23090.3 states that the "board . . . and each party to the action or proceeding before the board shall have the right to appear in the review proceeding," and under § 23090.4, a copy of the pleadings must be served "on each party" who appeared before the board.
>
> We hold that these provisions read as a whole, limit the right of review of the board's decision to parties who appeared before the board. This limitation is consistent with the rule followed by appellate courts in reviewing the action of trial courts. In such cases a person who is not a party of record to the proceeding below has no standing to appeal. (*Eggert v. Pac. States S.&L. Co.* (1942) 20 Cal.2d 199 [124 P.2d 815]; *City of Downey v. Johnson* (1968) 263 Cal.App.2d 775, 782 [69 Cal.Rptr. 830]; *People v. United Bonding Ins. Co.* (1969) 272 Cal.App.2d 441, 442 [77 Cal.Rptr. 310].) Young's Market did not appear below and therefore has no right to seek review here."

Upon comparison, it is clear that the words "any person aggrieved" and "any party aggrieved", used with reference to appeals filed with the board, are similarly used, interchangeably, when review of a board decision is sought before an appellate court. It could thus be consistent, under the reasoning of the Supreme Court, to conclude that only *parties* who appeared at the department hearing have the right to appeal a decision of the department to this board.

The petitioner does assert that board Rule 194, supra, is of no assistance to it, due to the fact that this rule pertains only to the filing of an amicus curiae brief (Memo in Support of Petition, p.12).

While petitioner refers to a liberalization of Code of Civil Procedure § 387, by amendment in 1977, petitioner admits that there is no similar wording on intervention in administrative proceedings; that neither statutory nor case law specifically answers the question presented (Memo in Support of Petition, pp.3-4). Moreover, appellant admits it is not yet aggrieved under a decision of the department; that it would be only if the appeals board should rule adversely as to the statute and/or rule involved.

Under the circumstances, we conclude that petitioner does not have the right to intervene as a party in this appeal before the board. The Petition for Intervention is denied. The brief of Wine and Spirits Wholesalers of California will be received, however, as that filed by an amicus curiae (§ 194, Title 4, California Administrative Code, supra).

In addition, on October 19, 1981, a Motion to Consolidate this matter with the appeal of *Mutual Wholesale Liquor, Inc.* (AB-4896, File 50085, Reg. 15618), which involves similar issues, was filed with this board. Oral argument as to both of these cases was heard by the board on September 3, 1981 and they were taken under submission at that time. Hence, the Motion to Consolidate is denied, as not timely filed. Moreover, the board has no express authority in this regard, like that conferred upon a court by Code of Civil Procedure § 1048.

Ruling on Appeal

Appellant (rectifier) was determined to have violated Business and Professions Code § 24756 and § 100, Title 4 of the California Administrative Code for selling distilled spirits to a retail licensee at a price or quantity discount at other than the price or quantity discount contained in schedules on file with the department.

In *Rice v. Alcoholic Beverage Control Appeals Board*, 21 Cal.3d 431, the California Supreme Court held that the price maintenance program relating to the retail sale of distilled spirits violated the Sherman Act. Subsequently, the U.S. Supreme Court upheld a California Court of Appeal decision, which ruled that California's wine pricing system constituted retail sale price maintenance in violation of the Sherman Act. (*California Retail Liquor Dealers Assn. v. Mid-Cal Alum.*, 90 Cal.App.3d 979, 100 S.Ct. 937.)

Business and Professions Code § 24756[1], and § 100 Title 4 of the California Administrative Code[2], which

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[1]Business and Professions Code § 24756 provides:

"Every distilled spirits manufacturer, brandy manufacturer, rectifier, and wholesaler shall file and maintain with the department a price list showing the prices at which distilled spirits are sold to retailers by the licensee. Domestic brandy shall not be assorted with other distilled spirits for quantity discounts, except that imported brandy, upon which duty is paid, may be assorted for quantity discounts only with imported distilled spirits upon which duty is paid. Sales of distilled spirits to retailers by each distilled spirits manufacturer, brandy manufacturer, rectifier, and wholesaler shall be made in compliance with the price list of the licensee on file with the department."

[2]Section 100, Title 4, California Administrative Code provides:

"(a) Each manufacturer, rectifier or wholesaler who sells or distributes distilled spirits in this State to retailers shall file and maintain with the department, in triplicate, and in such form as the department may prescribe, a written price schedule showing the price per case at which distilled spirits will be sold or distributed, and the discounts offered by such person to retail licensees within the State.

"Such schedules shall be filed by eligible licensees at the time their license is issued and before any sales are made, and shall be effective immediately upon filing with the department at its headquarters office, 1215 O Street, Sacramento 94814. When a manufacturer, rectifier or wholesaler license is transferred from one legal entity to another, new price posting and quantity discount schedules shall be submitted by the new

appellant was determined by the department to have violated, require every manufacturer, rectifier and wholesaler to file and maintain with the department a price list

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licensed entity before any sales are made. Such schedules shall become effective immediately upon filing with the headquarters office of the department.

"Distilled spirits single case price posting schedules and quanity discount schedules once filed with the department will remain in effect until superseded or withdrawn by a superseding schedule.

"(b) Definitions.

"(1) The term "posting period" as used herein shall be one calendar month. A complete new schedule of prices and quantity discounts shall be filed every month on or before the fifteenth day of each month to become effective on the first day of the following month. Each new product, price and discount change from the previous month shall be underlined, and each such schedule shall be preserved by the filing licensee for a period of one year and made available to the department for its inspection during business hours.

"(2) The word "brand" as used herein means "brand, trademark, label or name", as shown on the primary label, and if an additional secondary name or a different shape or color of label is used, each will be considered to be a separate brand.

"(3) The "same type" of distilled spirits is one identical in all of the following categories: (A) type of distilled spirits, including type of bottling (in bond or not in bond), and type of blend (blend of straight whiskeys or spirits blend); (B) percentage of straight whiskey; (C) age, if shown on the label; (D) proof; (E) origin (domestic or imported); (F) bottle size; and (G) number of bottles in a case.

"(4) A "competitive brand" is a brand of the same type of distilled spirits for which a change in price is being filed and for which there is on file a price schedule sheet filed by some other licensee showing a price per case for the competitive brand which is within three dollars ($3) per case of the price being charged by the licensee filing the competitive posting.

"(5) "Trade journals" or "industry price books of general circulation" are trade journals or industry price books published for the dissemination of information of interest to persons selling, dealing in, distributing, producing, manufacturing, dispensing, possessing for resale, or transporting alcoholic bever-

showing the prices at which distilled spirits are to be sold to retailers. For the reasons set forth in the two above cited cases, § 24756 and § 100, supra, would also appear to

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ages, which publications have bona fide subscription lists of paying subscribers, and which have been established, printed, and published a regular intervals in this State for at least one year.

"A list of publications determined by the department to qualify as trade journals or industry price books of general circulation may be obtained from the Sacramento office of the department. Publications desiring to be determined as constituting trade journals or industry price books of general circulation in this State may petition the department for such a determination.

"For the purposes of this rule, interstate common carriers and purchasers located on military and federal reservations are not to be deemed "retailers".

"(c) Amendments to price schedules may be deposited in the United States mail, addressed to the department, or placed on file in the Sacramento office of the department on or before the fifteenth day of December, February, April, June, August or October, to become effective on the first day of the posting period following the filing thereof. Such amendments to price schedules shall not be available for public review until on or after the sixteenth day of the month in which they are submitted, except that when the provisions of paragraph (1) below apply, the schedules shall be available for review on the first working day after the filing date is determined by that paragraph.

"(d) No manufacturer, rectifier or wholesaler of distilled spirits shall file a price schedule on which is shown a selling price per case at less than the cost thereof to such manufacturer, rectifier or wholesaler, in violation of the California Unfair Practices Act.

"(e) Prices may be filed below the manufacturer's, rectifier's or wholesaler's cost, as defined in the California Unfair Practices Act, when such prices are filed to meet, in good faith, legal prices filed with the department on similar distilled spirits by a competing manufacturer, rectifier or wholesaler.

"(f) Manufacturers, rectifiers or wholesalers can meet competitive prices on similar distilled spirits of a "competitive

be invalid. Section 24756, as well as Rule 100, are an integral part of the liquor price maintenance laws discussed in *Rice* and *Midcal*, supra. Because of these prior

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brand" of distilled spirits by depositing in the United States mail addressed to the Department, or placing on file in the Sacramento office of the department on or before the fifteenth day of any posting period an amendment to their effective price schedule which lowers their price or prices per case or increases their quantity discounts. Such amended price schedule shall become effective at the same time the competitive price for a similar item of the competitive brand shall become effective, or immediately if such competitive price schedule shall have become effective. Manufacturers, rectifiers or wholesalers can meet competitive prices on the same brand, type and size container of distilled spirits by amending their effective price schedule at any time to become effective at the same time the competitive price for the same brand, type and size of container shall become effective, or immediately if such competitive price schedule shall have become effective. Competitive schedules expire at the end of the posting period in which they were effective.

"A quantity discount filed to meet competition may not be filed in an amount that would reduce the net price of the brand, type or size container below the net price of the competitive brand for the same quantity.

"(g)(1) A quantity discount may be offered on a sale of two or more cases, whether original cases or assorted cases, and on each package in excess of two cases on a pro rata basis, except that imported distilled spirits, upon which duty is paid may not be assorted with domestic distilled spirits, and domestic brandy may not be assorted for discount with any other type of distilled spirits.

"The following containers are substantially the same size and for the purposes of quantity discounts are interchangeable: one half-gallon with 1.75 liters, one quart with one liter, one fifth with 750 milliliters, 24 ounces with 750 milliliters, one pint with 500 milliliters, one tenth with 500 milliliters, and one half-pint with 200 milliliters.

"(2) All postings, including quantity discount schedules, are public records.

court decisions, the statute and rule before us are a part of the few remaining laws on the subject. As previously stated, § 24756 requires the filing of a price list at which

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"(3) Quantity discounts filed must be understandable and enforceable by the department. Quantity discounts filed in conformity with any of the following three schedules will be presumed to be understandable and enforceable:

"(A) Schedule A, Brand Discounts. Quantity discounts may be filed for a single brand. All sizes of the brand are assortable, if so specified. The brand may not assort with another brand in this schedule.

"The discounts filed in this schedule shall not be used or combined for quantity with those discounts filed in Schedules B and C.

"(B) Schedule B, Multiple Brand Discounts. Quantity discounts may be filed for brands of distilled spirits owned or controlled by the same person when grouped together in the schedule at the same or different discount rates than in Schedules A or C.

"The brands and sizes filed in this schedule may also be combined into one or more assortments of brands and sizes as specified. However, if a brand is included in more than one Schedule B assortment, the discount must be identical for each of the sizes and quantities filed in those assortments.

"No Schedule B assortment shall be used or combined for quantity with any other Schedule B assortment.

"The discounts filed in this schedule shall not be used or combined for quantity with those discounts filed in Schedules A and C.

"(c) Schedule C, Special Size Discounts. Quantity discounts may be filed for a single brand or brands of distilled spirits owned or controlled by the same person for not more than any two sizes at the same or different discount rates than in Schedules A or B.

"If a brand and size is included in more than one Schedule C assortment, the discount must be identical for each of the sizes and quantities filed in those assortments.

"No Schedule C assortment shall be used or combined for quantity with any other Schedule C assortment.

distilled spirits are sold to retailers. The appellate court in *Midcal*, supra, stated:

"Under Business and Professions Code § 24862 no licensee may sell or resell to a retailer, and no retailer

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"No Schedule C assortment shall be used or combined for quantity with those discounts filed in Schedules A and B.

"Filing licensees are to indicate directly below each schedule all explanatory statements they consider applicable to that posting such as: sizes assort; sizes do not assort; brands and sizes assort; brands and sizes do not assort.

"Any quantity discount which does not conform to the schedules set forth above shall be separately filed and clearly identified no later than the first day of December, February, April, June, August or October to be effective on the first day of the next posting period.

"If the filing is found to be defective, it will be rejected, setting forth the reasons for the rejection.

"(4) Tie-in sales are prohibited. No discount, or any portion thereof, on any distilled spirits in any quantity or quantities, shall in any way, directly or indirectly, be predicated upon, or conditioned upon, the purchase of any other distilled spirits.

"(5) Any filing licensee who publishes, mails, delivers, distributes, advertises or in any other way, directly or indirectly, disseminates distilled spirits quantity discount information for any brand, to retail licensees served by him, shall, in any such material, include all quantity discounts filed by him for such brand. If a filing licensee so publishes, mails, delivers, distributes, advertises or in any other way, directly or indirectly, disseminates such information on all quantity discounts filed by him for any brand, he shall disseminate such information to all retailers served by him.

"(6) The publication, mailing or delivering of any written material containing less than all of the quantity discounts posted for any brand by a filing licensee shall be deemed a violation of this rule.

"(7) The mailing or delivering of written lists of quantity discounts to selective retail licensees rather than to all such licensees served by the filing licensee shall be deemed a violation of this rule.

"(8) The publication of all quantity discount schedules filed with the department by a filing licensee, on or before the effective date thereof, in one or more trade journals or industry

may buy any item of wine except at the selling or resale price contained in an effective price schedule or in an effective fair trade contract. No licensee is permitted to

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price books of general circulation among retail licensees in this State, or in parts or trading areas of this State, shall be deemed sufficient compliance with the provisions of subparagraphs (5), (6) and (7) of this paragraph.

"(9) Notification to retail licensees of quantity discount schedules by a method other than by publication in a trade journal or industry price book shall be accomplished on or before the effective date of such quantity discount schedules.

(10) The quantity discounts on a brand sold only to one retailer need not be published.

"(h) A quantity discount sale is a single order for delivery within two consecutive business days to a licensed retailer at the premises of the distributor, or to the same premises of the licensed retailer at the discount in effect on the day the delivery was commenced. Saturdays, Sundays and holidays are not to be deemed as business days.

"(i) In the computation of quantity discounts the word "case" as used in this rule shall mean: 3 full gallons, 6 half-gallons, 12 quarts, 12 packages containing more than one pint but not more than one fifth, 24 packages containing more than one-half pint but not more than one pint, and 48 half-pints. When packages are in metric sizes, "case" shall mean: 6 as to 1.75 liter, 12 as to liters or 750 milliliters, 24 as to 500 milliliters, and 48 as to 200 milliliters.

"(j) Any manufacturer, rectifier or wholesaler may at any time file with the department written price schedules showing the price per case and the quantity discount offered on any new brand of distilled spirits, or on any distilled spirits which are not the "same type" as those currently on file by that licensee, to become effective immediately.

"(k) No manufacturer, rectifier or wholesaler shall advertise or offer for sale or sell distilled spirits to retailers at a price or quantity discount other than the price or quantity discount provided for by his price schedules or amendments thereto on file with the department.

"(l) Whenever the fifteenth day of the month falls on a Saturday, Sunday or a legal holiday, the distilled spirits price schedules required to be placed on file in the Sacramento office of the department may be filed or placed in the United

sell or resell to any consumer any item of wine at less than the selling or resale price contained in an effective price schedule or fair trade contract.

> Under § 24866 each grower, wholesaler and wine rectifier must make and file fair trade contracts and/or file schedules of the resale prices of wines. These sections result in price fixing in wine identical to that found to be repugnant to the Sherman Antitrust Act when applied to distilled spirits. (See *Rice v. Alcoholic Bev. etc. Appeals Bd., supra*, 21 Cal.3d at pp. 445-446; see also, *Capiscean Corporation v. Alcoholic Bev. etc. Appeals Bd.* (1979) 87 Cal.App.3d 996 [151 Cal.Rptr. 492], holding the price maintenance provisions relating to the retail price of wine to be invalid under *Rice*.) Our consideration is controlled by the reasoning of the Supreme Court in *Rice*. Unless there appears an independent basis for upholding the fair trade laws relating to wine we must declare those laws to be invalid." (90 Cal.App.3d 979, 993.)

Section 24866, supra, is similar to § 24756. § 24866 was related to Business and Professions Code § 24862, as § 24756 bore a relationship to § 24755, which was declared invalid in *Rice*, supra. Furthermore, in *Rice*, supra, with reference to there being a uniformity of price among leading brands of liquor under the retail price maintenance system in California, the court stated:

States mail addressed to the department not later than the close of the next business day.

"(m) Pursuant to an order issued by the department, any distilled spirits price schedule may be changed at any time to reflect changes in federal or state excise taxes on distilled spirits or to comply with the requirements or any order issued by the Federal Government relating to price control.

"(n) If any paragraph, sentence, clause or phrase of this rule is for any reason declared invalid, such decision shall not affect the validity of the remaining provisions of this rule."

> "Indeed, the posting system facilitates price fixing among producers. While it may be a per se violation of the Sherman Act for competitors to exchange price information on a regular basis (*United States v. Container Corp.* (1969) 393 U.S. 333, 336-337 [21 L.Ed. 2d 526, 529-530, 89 S.Ct. 510]), producers may readily determine the prices charged by their competitors by referring to the prices filed with the department or to industry publications listing the posted prices. (Cal Admin. Code, Title 4, § 99.2, subd. (b)(2).)" (23 Cal.3d 431, 455.)

An identical situation exists by virtue of § 24756 and Rule 100—the required posting with the department a price list showing the prices at which distilled spirits are to be sold to retailers, provides a depository whereby competitors (manufacturers, wholesalers) can and do exchange price information on a regular basis. Indeed, the rule invites periodic examination of the price lists on file with the department. Subsection (f) of Rule 100 provides in part:

> "(f) Manufacturers, rectifiers or wholesalers can meet competitive prices on similar distilled spirits of a "competitive brand" of distilled spirits by depositing in the United States mail addressed to the Department, or placing on file in the Sacramento office of the department on or before the fifteenth day of any posting period an amendment to their effective price schedule which lowers their price or prices per case or increases their quantity discounts. Such amended price schedule shall become effective at the same time the competitive price for a similar item of the competitive brand shall become effective, or immediately if such competitive price schedule shall have become effective. Manufacturers, rectifiers or wholesalers can meet competitive prices on the same brand, type and size container of distilled spirits by amending their effective price

> schedule at any time to become effective at the same time the competitive price for the same brand, type and size of container shall become effective, or immediately if such competitive price schedule shall have become effective. Competitive schedules expire at the end of the posting period in which they were effective."

Thus, the statute and rule in question are a part of the scheme for the fixing of prices.[3]

Moreover, § 24756, supra, by use of the words that "sales of distilled spirits to retailers . . . shall be made in compliance with the price lists of the licensee on file with the department", serves to assure and protect other competitors that the one filing the price list will not sell to anyone at a lesser price.

No state action is here involved. As existed in the cited prior decisions pertaining to price maintenance (*Rice* and *Midcal*, supra), the state does not establish its own pricing scheme nor review the reasonableness of the prices set by others. In this instance, the state merely provides, at the taxpayer's expense, a facility for the checking of prices by competitors. It serves no other purpose. The state's only "action" is in facilitating the exchange of such information, which results in a uniformity of prices—a practice which stifles rather than promotes competition.

The Twenty-first Amendment of the United States Constitution provides no basis for upholding the statute and rule in question, for the same reasons enunciated in *Rice* and *Midcal*, supra.

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[3]While the court in *Midcal*, supra, 90 Cal.App.3d 979, 985 makes a distinction between the filing of a "price schedule" and "price lists", this would appear to be a distinction without a difference. Furthermore, it is dicta, rather than a ruling that a "price list" would not result in price fixing.

The appeals board is, however, prohibited from declaring a statute unconstitutional (§ 3.5, Article III, California Constitution). While this constitutional provision would not (contrary to the department's determination) seem to prohibit the appeals board from declaring the rule invalid (see *Goldin v. Public Utilities Commission*, 23 Cal.3d 638, fn.18), we refrain from doing so inasmuch as it would be an idle act. As stated in *Rice*, supra, the court's conclusion regarding the validity of § 24755 would also apply to the department's rule implementing the section (21 Cal.3d 431, 436 [fn.2]). In this instance, the department rule (see par. (a), § 100, Title 4, California Administrative Code, supra) is based upon and contains provisions like those in § 24756, which appellant was determined to have violated. Hence, the validity of the rule is dependent upon a determination as to the validity of the statute.[4] Declaring the rule invalid would be tantamount to declaring unenforceable its enabling statute, which is prohibited by § 3.5, Article III of the California Constitution. For these reasons, the decision of the department is affirmed.

Jacob F. West, Chairman
Alcoholic Beverage Control
Appeals Board

Members concurring:
James S. Lee
Eduardo Sandoval

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[4]A similar position was taken by the board in *Capiscean Corp.*, AB-4490 and *Ferrigno*, AB-4673.

Litigation challenging the validity of the pertinent provisions is currently pending before the U.S. District Court of Northern California (*Enrico's, Inc. v. Rice*, C-81-0068 SC).

Appendix C

State of California
Department of Alcoholic Beverage Control
Certificate of Decision

File 48292

Reg. 12952

It is hereby certified that the Department of Alcoholic Beverage Control, having reviewed the findings of fact, determination of issues and recommendation in the attached proposed decision submitted by an Administrative Law Judge of the Office of Administrative Hearings, adopted said proposed decision as its decision in the case therein described on December 26, 1980.

Sacramento, California
Dated: December 26, 1980

BEATRICE SMALLEY
Hearing and Legal Unit

State of California
Department of Alcoholic Beverage Control

100 Folios
File 48292
Reg. 12952

Licenses: 06, 07, 09, 12, 17

Time of Hearing: October 6, 1980

Place of Hearing: San Francisco, California

Reporter: Albert Levy N 14920

Appearances:

For the Department:

Donald L. Tipton, Counsel

For the Respondent:

Leland, Parachini, Steinberg,
Finn, Matzger & Melnick by
Daniel Leraul, Attorneys
220 Bush Street
San Francisco, CA 94104

In the Matter of the Accusation
against

Lewis-Westco & Co.
3003 Third Street
San Francisco, California

Still, Rectifiers, Beer & Wine Importer,
Distilled Spirits Importer and Beer & Wine Wholesaler

under the Alcoholic Beverage Control Act.

I hereby certify that the following constitutes my proposed decision in the above-entitled matter as a result of the hearing held before me at the above time and place, after due notice thereof having been given according to law, and I hereby recommend its adoption as the decision of the Department of Alcoholic Beverage Control.

PROPOSED DECISION

"Findings of Fact:

"I

"Count I

"On or about July 26, 1979, the above-named rectifier did sell distilled spirits to B. T. DeGeorge, dba Say Cheese, 1118 Meridian Road, San Jose, an off-sale general retail licensee, at a price or quantity discount other than the price or quantity discount contained in price or quantity discount schedules on file with the Department of Alcoholic Beverage Control, to-wit:

	Posted Discount Per Case	Discount Allowed Per Case On Invoice # 19222
(a) Two cases of Seagram's V. O. Canadian Whisky, 86.8 proof, quart bottles, 6 years old	0	$5.00
(b) One case of Seagram's V. O. Canadian Whisky, 86.8 proof, 1.75 liter bottles, 6 years old	0	5.00
(c) One case of Canadian Club Canadian Whisky, 86.8 proof, 1.75 liter bottles, 6 years old	0	5.00
(d) Two cases of Ron Bacardi Superior Puerto Rican Rum (silver label), 80 proof, 1.75 liter bottles	0	8.00
(e) One case of Kahlua, Mexican Coffee Liqueur, 53 proof, 23 oz. size bottles	0	5.00
(f) One case of Johnnie Walker Red Label, Scotch Whisky, 86.8 proof, 750 ml. size bottles	0	5.00
(g) One case of Grand Marnier, Liqueur, 80 proof, 23 oz. size bottles	0	5.00
(h) One case of Seagram's Crown Royale, Canadian Whisky, 80 proof, quart size bottles	0	5.00

in violation of section 24756 of the Business and Professions Code, State of California, and rule 100, title 4, California Administrative Code.

"II

"Count II

"On or about July 26, 1979, the above-named rectifier did sell distilled spirits to Leland R. and Sally C. Chew, dba South Shore Liquors, 549 W. Plaza, Alameda, an off-sale general retail licensee, at a price or quantity discount other than the price or quantity discount contained in price or quantity discount schedules on file with the Department of Alcoholic Beverage Control, to-wit:

	Posted Discount Per Case	Discount Allowed Per Case On Invoice # 19226
(a) Four cases of J & B Scotch Whisky, 86 proof, 750 ml. size bottles	0	$5.00
(b) One case of Ron Bacardi Superior Puerto Rican Rum (Silver Label), 80 proof, 1.75 liter bottles	0	8.00
(c) Two cases of Kahlua, Mexican Coffee Liqueur, 53 proof, 23 oz. size bottles	0	5.00
(d) One case of Johnnie Walker Red Label Scotch Whisky, 86.8 proof, 750 ml. size bottles	0	5.00
(e) One case of Johnnie Walker Red Label Scotch Whisky, 86.8 proof, quart size bottles	0	5.00
(f) One case of Jim Beam Kentucky Straight Bourbon Whiskey, 80 proof, 750 ml. size bottles	0	5.00
(g) One case of Jim Beam Kentucky Straight Bourbon Whiskey, 80 proof, 1.75 liter size bottles	0	5.00

in violation of section 24756 of the Business and Professions Code, State of California, and rule 100, title 4, California Administrative Code.

"III

"Count III

"On or about July 26, 1979, the above-named rectifier did sell distilled spirits to Best Buy Bottles, Inc., 6111 Meridian Avenue, San Jose, an off-sale general retail licensee, at a price or quantity discount other than the price or quantity discount contained in price or quantity discount schedules on file with the Department of Alcoholic Beverage Control, to-wit:

	Posted Discount Per Case	Discount Allowed Per Case On Invoice # 19219
(a) Three cases of J & B Scotch Whisky, 86 proof, 750 ml. size bottles	0	$5.00
(b) Three cases of Canadian Club, Imported Canadian Whisky, 86.8 proof, 750 ml. size bottles	0	5.00
(c) Two cases of Jim Beam, Kentucky Straight Bouborn Whiskey, 80 proof, 750 ml. size bottles	0	5.00
(d) One case of Johnnie Walker Red Label, Scotch Whisky, 86.8 proof, 750 ml. size bottles	0	5.00
(e) Two cases of Wild Turkey, Straight Bourbon Whiskey, 101 proof, 750 ml. size bottles	0	5.00
(f) One case Johnnie Walker Black Label, Scotch Whisky, 86.8 proof, 750 ml. size bottles	0	5.00

in violation of section 24756 of the Business and Professions Code, State of California, and rule 100, title 4, California Administrative Code.

"IV

"Count IV

"On or about July 26, 1979, the above-named rectifier did sell distilled spirits to M. Beacon & A. Domingo, dba Village Bottle Shop—R.C., 504 El Camino Real, Redwood City, an off-sale general retail licensee, at a price or quantity discount other than the price or quantity discount contained in price or quantity discount schedules on file with the Department of Alcoholic Beverage Control, to-wit:

	Posted Discount Per Case	Discount Allowed Per Case On Invoice # 19221
(a) Six cases of Kahlua, Mexican Coffee Liqueur, 53 proof, 23 oz. size bottles	0	$5.00
(b) Two cases of Grand Marnier, Liqueur, 80 proof, 23 oz. size bottles	0	5.00
(c) Two cases of Jim Beam, Kentucky Straight Bourbon Whiskey, 80 proof, 1.75 liter size bottles	0	5.00
(d) Two cases of Jim Beam, Kentucky Straight Bourbon Whiskey, 80 proof, 750 ml. size bottles	0	5.00
(e) Two cases Seagram's V. O. Canadian Whisky, 86.8 proof, 1.75 liter size bottles	0	5.00

in violation of section 24756 of the Business and Professions Code, State of California, and rule 100, title 4, California Administrative Code.

"V

"Count V

"On or about July 26, 1979, the above-named rectifier did sell distilled spirits to Erika and John Davis, dba Skyline Bottle Shop, 11893 Skyline Boulevard, Oakland, an off-sale general retail licensee, at a price or quantity discount other than the price or quantity discount contained in price or quantity discount schedules on file with the Department of Alcoholic Beverage Control, to-wit:

	Posted Discount Per Case	Discount Allowed Per Case On Invoice # 19214
(a) One case of J & B Scotch Whisky, 86 proof, 750 ml. size bottles	0	$5.00
(b) One case of Liquore Galliano, Liqueur, 70 proof, 23 oz. size bottles	0	5.00
(c) Three cases of Kahlua, Mexican Coffee Liqueur, 53 proof, 23 oz. size bottles	0	5.00
(d) One case of Hennessy Bras Arms, Cognac V.S., 80 proof, 750 ml. size bottles	0	5.00
(e) One case of Johnnie Walker Red Label, Scotch Whisky, 86.8 proof, 750 ml. size bottles	0	5.00
(f) One case of Johnnie Walker Black Label, Scotch Whisky, 86.8 proof, 750 ml. size bottles	0	5.00
(g) Five cases of Seagram's V.O. Canadian Whisky, 86.8 proof, quart size bottles	0	5.00

in violation of section 24756 of the Business and Professions Code, State of California, and rule 100, title 4, California Administrative Code.

"VI

"Respondent has been licensed as indicated above since April 26, 1965. There is no record of any disciplinary action against the respondent."

DETERMINATION OF ISSUES:

1. Respondent has challenged the validity and enforceability of rule 100 on various grounds. Section 3.5 of article III of the California Constitution provides as follows:

> "Section 3.5. An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:
>
> (a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;
>
> (b) To declare a statute unconstitutional;
>
> (c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations."

This provision of the California Constitution prohibits the Department of Alcoholic Beverage Control from declaring rule 100 invalid. For this reason, respondent's objection to the validity of rule 100 are overruled.

2. Counts I, II, III, IV and V—As to each count, respondent violated section 24756 of the Business and Professions Code, and rule 100, title 4, California Administrative Code. Cause for discipline exists as to each count pursuant to Business and Professions Code section 24200, subdivisions (a) and (b), and section 22 of article XX of the California Constitution.

ORDER:

The license is suspended for ten (10) days as a penalty for each count; provided, however, that execution of the suspensions shall be stayed upon the condition that no subsequent final determination be made, after hearing or upon stipulation and waiver, that cause for disciplinary action occurred within one year from the effective date of this decision; that should such determination be made, the director of the Department of Alcoholic Beverage Control may, in his discretion and without further hearing, vacate this stay order and reimpose the stayed portion of the penalty; and that should no such determination be made, the stay shall become permanent. The suspensions ordered hereunder shall be concurrent.

Dated at: San Francisco, California
November 7, 1980

/s/ PHILIP V. SARKISIAN
Administrative Law Judge
of the Office of
Administrative Hearings
State of California

PVS:lhj

Appendix D

Constitutional and Statutory Provisions Involved

United States Constitution, Amendment XXI.

Section 2.

"The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

Sherman Act, 15 U.S.C.

Section 1.

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony. . . ."

27 U.S.C. § 121.

All fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.

27 U.S.C. § 122.

The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted,

fermented, or other intoxicating liquor of any kind, from one State, Territory or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited.

California Constitution, Article 20

Sec. 22. The State of California, subject to the internal revenue laws of the United States, shall have the exclusive right and power to license and regulate the manufacture, sale, purchase, possession and transportation of alcoholic beverages within the State, and subject to the laws of the United States regulating commerce between foreign nations and among the states shall have the exclusive right and power to regulate the importation into and exportation from the State, of alcoholic beverages. In the exercise of these rights and powers, the Legislature shall not constitute the State or any agency thereof a manufacturer or seller of alcoholic beverages.

All alcoholic beverages may be bought, sold, served, consumed and otherwise disposed of in premises which shall be licensed as provided by the Legislature. In providing for the licensing of premises, the Legislature may provide for the issuance of, among other licenses, licenses for the following types of premises where the alcoholic

beverages specified in the licenses may be sold and served for consumption upon the premises.

(a) For bona fide public eating places, as defined by the Legislature.

(b) For public premises in which food shall not be sold or served as in a bona fide public eating place, but upon which premises the Legislature may permit the sale or service of food products incidental to the sale and service of alcoholic beverages. No person under the age of 21 years shall be permitted to enter and remain in any such premises without lawful business therein.

(c) For public premises for the sale and service of beers alone.

(d) Under such conditions as the Legislature may impose, for railroad dining or club cars, passenger ships, common carriers by air, and bona fide clubs after such clubs have been lawfully operated for not less than one year.

The sale, furnishing, giving, or causing to be sold, furnished, or giving away of any alcoholic beverage to any person under the age of 21 years is hereby prohibited, and no person shall sell, furnish, give or cause to be sold, furnished, or given away any alcoholic beverage to any person under the age of 21 years, and no person under the age of 21 years shall purchase any alcoholic beverage.

The Director of Alcoholic Beverage Control shall be the head of the Department of Alcoholic Beverage Control, shall be appointed by the Governor subject to confirmation by a majority vote of all of the members elected to the Senate, and shall serve at the pleasure of the Governor. The director may be removed from office by the Governor, and the Legislature shall have the power, by a majority vote of all members elected to each house, to remove the

director from office for dereliction of duty or corruption or incompetency. The director may appoint three persons who shall be exempt from civil service, in addition to the person he is authorized to appoint by Section 4 of Article XXIV.

The Department of Alcoholic Beverage Control shall have the exclusive power, except as herein provided and in accordance with laws enacted by the Legislature, to license the manufacture, importation and sale of alcoholic beverages in this State, and to collect license fees or occupation taxes on account thereof. The department shall have the power, in its discretion, to deny, suspend or revoke any specific alcoholic beverages license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals, or that a person seeking or holding a license has violated any law prohibiting conduct involving moral turpitude. It shall be unlawful for any person other than a licensee of said department to manufacture, import or sell alcoholic beverages in this State.

The Alcoholic Beverage Control Appeals Board shall consist of three members appointed by the Governor, subject to confirmation by a majority vote of all of the members elected to the Senate. Each member, at the time of his initial appointment, shall be a resident of a different county from the one in which either of the other members resides. The members of the board may be removed from office by the Governor and the Legislature shall have the power, by a majority vote of all members elected to each house, to remove any member from office for dereliction of duty or corruption or incompetency.

When any person aggrieved thereby appeals from a decision of the department ordering any penalty assessment, issuing, denying, transferring, suspending or revoking any license for the manufacture, importation, or sale of alcoholic beverages, the board shall review the

decision subject to such limitations as may be imposed by the Legislature. In such cases, the board shall not receive evidence in addition to that considered by the department. Review by the board of a decision of the department shall be limited to the questions whether the department has proceeded without or in excess of its jurisdiction, whether the department has proceeded in the manner required by law, whether the decision is supported by the findings, and whether the findings are supported by substantial evidence in the light of the whole record. In appeals where the board finds that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before the department it may enter an order remanding the matter to the department for reconsideration in the light of such evidence. In all other appeals the board shall enter an order either affirming or reversing the decision of the department. When the order reverses the decision of the department, the board may direct the reconsideration of the matter in the light of its order and may direct the department to take such further action as is specially enjoined upon it by law, but the order shall not limit or control in any way the discretion vested by law in the department. Orders of the board shall be subject to judicial review upon petition of the director or any party aggrieved by such order.

Business and Professions Code § 23402

No retail on- or off-sale licensee, except a daily on-sale general licensee holding a license issued pursuant to Section 24045.1, shall purchase alcoholic beverages for resale, from any person except a person holding a beer manufacturer's, wine grower's, rectifier's, brandy manufacturer's, or wholesaler's license.

Business and Professions Code § 23815

Public welfare and morals. It is hereby determined that the public welfare and morals require that there be a limitation on the number of premises licensed for the sale of distilled spirits.

Business and Professions Code § 24013

Protests may be filed at any office of the department at any time within 30 days from the first date of posting the notice of intention to engage in the sale of alcoholic beverages at such premises.

The department may reject protests, except protests made by a public agency or public official or protests made by the governing body of a city or county, if it determines such protests are false, vexatious, or without reasonable or probable cause at any time before hearing thereon, notwithstanding the provisions of Section 24016 or 24300. The department shall also reject any protests against an off-sale beer and wine retail alcoholic beverage license which are based on evidence, information or conditions resulting from operation of the premises, such as operating hours, parking availability or operating noise, not resulting solely from the sale of alcoholic beverages. If the department rejects a protest as provided in this section and issues a license, a protestant whose protest has been rejected may, within 10 days after the issuance of the license, file an accusation with the department alleging the grounds of protest as a cause for revocation of the license and the department shall hold a hearing as provided in Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.

Nothing in this section shall be construed as prohibiting or restricting any right which the individual making the protest might have to a judicial proceeding.

This section shall remain in effect until January 1, 1984, and as of such date is repealed.

Business and Professions Code § 24400

Notwithstanding any other provision of law, two or more retail licensees of the same type may agree to group purchase distilled spirits and wine from a licensed wholesaler or rectifier through a designated agent, subject to the following restrictions:

(a) The designated agent shall hold a retail license of the same type operating a premises in the same county or counties as the purchasing group.

(b) No retailer shall have more than one designated agent nor shall an agent make purchases for more than one group.

(c) The merchandise purchased for each group shall be delivered to and stored in either a single licensed premises or a single warehouse located in the same county as the premises of the purchasing group and such delivery shall be a single delivery within two consecutive business days at the discount in effect on the day the delivery was commenced. Saturday, Sunday, and holidays shall not be deemed business days.

(d) A record of purchase shall be made by the agent on a master purchase order. Each purchasing retailer shall furnish the designated agent with a signed order setting forth such licensee's purchase, to be attached to and become a part of the master order. Master and individual orders shall be maintained in compliance with Section 25752 and fiscal liability shall extend in so far as the amount of the purchase designated and delivered for each individual retailer of the purchasing group is subject to the provisions of Section 25509.

(e) The merchandise shall be deemed to have been received by each retailer member of the purchasing group when delivered to the designated premises.

(f) When a group buying member has not made payment in full by the expiration of the 30th day from date of delivery or has not paid the one percent charge at the expiration of the 30th day from the date the charge became due, such group buying member shall be expelled from the buying group and prohibited from rejoining that group or joining any other such group until such time that all payments have been received for the merchandise sold and delivered to such retailer more than 30 days previously.

Business and Professions Code § 24756

Every distilled spirits manufacturer, brandy manufacturer, rectifier, and wholesaler shall file and maintain with the department a price list showing the prices at which distilled spirits are sold to retailers by licensee. Domestic brandy shall not be assorted with other distilled spirits for quantity discounts, except that imported brandy, upon which duty is paid, may be assorted for quantity discounts only with imported distilled spirits upon which duty is paid. Sales of distilled spirits to retailers by each distilled spirits manufacturer, brandy manufacturer, rectifier, and wholesaler shall be made in compliance with the price list of the licensee on file with the department.

Business and Professions Code § 25500

No manufacturer, winegrower, manufacturer's agent, rectifier, California winegrower's agent, distiller, bottler, importer, or wholesaler, or any officer, director, or agent of any such person shall:

(a) License

(a) Hold the ownership, directly or indirectly, of any interest in any on-sale license.

(b) Financial aid

(b) Furnish, give, or lend any money or other thing of value, directly or indirectly, to, or guarantee the repayment of any loan or the fulfillment of any financial obligation of, any person engaged in operating, owning, or maintaining any on-sale premises where alcoholic beverages are sold for consumption on the premises.

(c) Furniture, fixtures, etc.

(c) Own any interest, directly or indirectly, in the business, furniture, fixtures, refrigeration equipment, signs, except signs for interior use mentioned in subdivision (g) of Section 25503, or lease in or of any premises operated or maintained under any on-sale license for the sale of alcoholic beverages for consumption on the premises where sold; or own any interest, directly or indirectly, in realty acquired after June 13, 1935, upon which on-sale premises are maintained unless the holding of the interest is permitted in accordance with rules of the department. . . .

Business and Professions Code § 25502

No manufacturer, winegrower, manufacturer's agent, California winegrower's agent, rectifier, distiller, bottler, importer, or wholesaler, or any officer, director, or agent of any such person, shall, except as authorized by this division:

(a) Hold the ownership, directly or indirectly, of any interest in an off-sale general license.

(b) Furnish, give, or lend any money or other thing of value, directly or indirectly, to, or guarantee the repayment of any loan or the fulfillment of any financial obligation of, any person engaged in operating, owning, or maintaining any off-sale general licensed premises.

(c) Own or control any interest, directly or indirectly, by stock ownership, interlocking directors, or trusteeship, in the business, furniture, fixtures, refrigeration equipment, signs, except signs for interior use mentioned in subdivision (g) of Section 25503, or lease in premises licensed with an off-sale general license.

(d) Own or control any interest, directly or indirectly, by stock ownership, interlocking directors, trusteeship, or mortgage of the realty upon which an off-sale general licensed premises is maintained.

Any wholesaler in counties not to exceed 15,000 population who holds both a beer and wine wholesaler's license and an off-sale general license and who held such licenses prior to September 19, 1947, may continue to hold such licenses or may transfer either or both licenses to another individual, individuals, partnership, corporation or other legal entity. Where both licenses are simultaneously transferred to an individual, individuals, partnership, corporation or other legal entity, the transfer shall be a person-to-person transfer only.

Nothing in this section prohibits any holder of a distilled spirits manufacturer's, manufacturer's agent's, California winegrower's agent, rectifier's, or wholesaler's license, or any officer, employee, or representative of any such licensee, from acting as a trustee for any off-sale general licensee in any bankruptcy or other proceedings for the benefit of the creditors of the off-sale general licensee.

Nothing in this section shall alter, change, or otherwise affect, retroactively or prospectively, any of the rights or privileges granted to a winegrower or brandy manufacturer by Section 23362 of this code, or by any other provision of this division.

(b) Financial aid

(b) Furnish, give, or lend any money or other thing of value, directly or indirectly, to, or guarantee the repayment of any loan or the fulfillment of any financial obligation of, any person engaged in operating, owning, or maintaining any on-sale premises where alcoholic beverages are sold for consumption on the premises.

(c) Furniture, fixtures, etc.

(c) Own any interest, directly or indirectly, in the business, furniture, fixtures, refrigeration equipment, signs, except signs for interior use mentioned in subdivision (g) of Section 25503, or lease in or of any premises operated or maintained under any on-sale license for the sale of alcoholic beverages for consumption on the premises where sold; or own any interest, directly or indirectly, in realty acquired after June 13, 1935, upon which on-sale premises are maintained unless the holding of the interest is permitted in accordance with rules of the department. . . .

Business and Professions Code § 25502

No manufacturer, winegrower, manufacturer's agent, California winegrower's agent, rectifier, distiller, bottler, importer, or wholesaler, or any officer, director, or agent of any such person, shall, except as authorized by this division:

(a) Hold the ownership, directly or indirectly, of any interest in an off-sale general license.

(b) Furnish, give, or lend any money or other thing of value, directly or indirectly, to, or guarantee the repayment of any loan or the fulfillment of any financial obligation of, any person engaged in operating, owning, or maintaining any off-sale general licensed premises.

(c) Own or control any interest, directly or indirectly, by stock ownership, interlocking directors, or trusteeship, in the business, furniture, fixtures, refrigeration equipment, signs, except signs for interior use mentioned in subdivision (g) of Section 25503, or lease in premises licensed with an off-sale general license.

(d) Own or control any interest, directly or indirectly, by stock ownership, interlocking directors, trusteeship, or mortgage of the realty upon which an off-sale general licensed premises is maintained.

Any wholesaler in counties not to exceed 15,000 population who holds both a beer and wine wholesaler's license and an off-sale general license and who held such licenses prior to September 19, 1947, may continue to hold such licenses or may transfer either or both licenses to another individual, individuals, partnership, corporation or other legal entity. Where both licenses are simultaneously transferred to an individual, individuals, partnership, corporation or other legal entity, the transfer shall be a person-to-person transfer only.

Nothing in this section prohibits any holder of a distilled spirits manufacturer's, manufacturer's agent's, California winegrower's agent, rectifier's, or wholesaler's license, or any officer, employee, or representative of any such licensee, from acting as a trustee for any off-sale general licensee in any bankruptcy or other proceedings for the benefit of the creditors of the off-sale general licensee.

Nothing in this section shall alter, change, or otherwise affect, retroactively or prospectively, any of the rights or privileges granted to a winegrower or brandy manufacturer by Section 23362 of this code, or by any other provision of this division.

Business and Professions Code § 25503

Prohibition

No manufacturer, winegrower, manufacturer's agent, California winegrower's agent, rectifier, distiller, bottler, importer, or wholesaler, or any officer, director, or agent of any such person, shall do any of the following:

(a) Conditional Sales

(a) Directly or indirectly, deliver the possession of any alcoholic beverages to any on- or off-sale licensee under an agreement of consignment whereby title to the alcoholic beverages is retained by the seller or whereby the licensee receiving the alcoholic beverages has the right at any time prior to sale to relinquish possession to or return them to the original seller.

(b) Free goods

(b) Directly or indirectly, give any licensee or any person any alcoholic beverages as free goods as a part of any sale or transaction involving alcoholic beverages.

(c) Secret rebates or concessions

(c) Give secret rebates or make any secret concessions to any licensee or the employees or agents of any licensee, and no licensee shall request or knowingly accept from another licensee secret rebates or secret concessions.

(d) Gifts

(d) Give or furnish, directly or indirectly, to any employee of any holder of a retail on-sale or off-sale license only anything of value for the purpose or with the intent to solicit, acquire, or obtain the help or assistance of the employee to encourage or promote either the purchase or the sale of the alcoholic beverage sold or manufactured by the licensee giving or furnishing anything of value, and any employee who accepts or acquires anything of value contrary to the provisions of this subdivision is guilty of a misdemeanor.

(e) Discrimination

(e) Willfully or knowingly discriminate, in the same trading area, either directly or indirectly, in the price of any brand of distilled spirits sold to different retail licensees purchasing under like terms and conditions.

(f) Advertising

(f) Pay, credit, or compensate a retailer or retailers for advertising, display, or distribution service in connection with the advertising and sale of distilled spirits.

Title 4, California Administrative Code, § 100.
Distilled Spirits Price Posting.

(a) Each manufacturer, rectifier or wholesaler who sells or distributes distilled spirits in this State to retailers shall file and maintain with the department, in triplicate, and in such form as the department may prescribe, a written price schedule showing the price per case at which distilled spirits will be sold or distributed, and the discounts offered by such person to retail licensees within the State.

Such schedules shall be filed by eligible licensees at the time their license is issued and before any sales are made, and shall be effective immediately upon filing with the department at its headquarters office, 1215 O Street, Sacramento 95814. When a manufacturer, rectifier or wholesaler license is transferred from one legal entity to another, new price posting and quantity discount schedules shall be submitted by the new licensed entity before any sales are made. Such schedules shall become effective immediately upon filing with the headquarters office of the department.

Distilled spirits single case price posting schedules and quantity discount schedules once filed with the department will remain in effect until superseded or withdrawn by a superseding schedule.

All quantity discount schedules shall be accompanied by an Index which records (a) which quantity discount sched-

ules are continued without change, (b) which schedules are to be changed effective the first day of the following posting period and (c) which are to be discontinued entirely by a superseding schedule accompanying the Index. For any posting period for which an Index is not submitted, all discount schedules previously filed shall remain in effect and no new or superseding discount schedules will be accepted for that posting period.

(b) Definitions. (1) The term "posting period" as used herein shall be two consecutive calendar months starting with the first day of January, March, May, July, September or November.

(2) The word "brand" as used herein means "brand, trademark, label or name," as shown on the primary label, and if an additional secondary name or a different shape or color of label is used, each will be considered to be a separate brand.

(3) The "same type" of distilled spirits is one identical in all of the following categories: (A) type of distilled spirits, including type of bottling (in bond or not in bond), and type of blend (blend of straight whiskeys or spirits blend); (B) percentage of straight whiskey; (C) age, if shown on the label; (D) proof; (E) origin (domestic or imported); (F) bottle size; and (G) number of bottles in a case.

(4) A "competitive brand" is a brand of the same type of distilled spirits for which a change in price is being filed and for which there is on file a price schedule sheet filed by some other licensee showing a price per case for the competitive brand which is within three dollars ($3) per case of the price being charged by the licensee filing the competitive posting.

(5) "Trade journals" or "industry price books of general circulation" are trade journals or industry price books published for the dissemination of information of interest

to persons selling, dealing in, distributing, producing, manufacturing, dispensing, possessing for resale, or transporting alcoholic beverages, which publications have bona fide subscription lists of paying subscribers, and which have been established, printed, and published at regular intervals in this State for at least one year.

A list of publications determined by the department to qualify as trade journals or industry price books of general circulation may be obtained from the Sacramento office of the department. Publications desiring to be determined as constituting trade journals or industry price books of general circulation in this State may petition the department for such a determination.

For the purposes of this rule, interstate common carriers and purchasers located on military and federal reservations are not to be deemed "retailers."

(c) Amendments to price schedules may be deposited in the United States mail, addressed to the department, or placed on file in the Sacramento office of the department on or before the fifteenth day of December, February, April, June, August or October, to become effective on the first day of the posting period following the filing thereof. Such amendments to price schedules shall not be available for public review until on and after the sixteenth day of the month in which they are submitted, except that when the provisions of paragraph (1) below apply, the schedules shall be available for review on the first working day after the filing date is determined by that paragraph.

(d) No manufacturer, rectifier or wholesaler of distilled spirits shall file a price schedule on which is shown a selling price per case at less than the cost thereof to such manufacturer, rectifier or wholesaler, in violation of the California Unfair Practices Act.

(e) Prices may be filed below the manufacturer's, rectifier's or wholesaler's cost, as defined in the California

Unfair Practices Act, when such prices are filed to meet, in good faith, legal prices filed with the department on similar distilled spirits by a competing manufacturer, rectifier or wholesaler.

(f) Manufacturers, rectifiers or wholesalers can meet competitive prices on similar distilled spirits of a "competitive brand" of distilled spirits by depositing in the United States mail, addressed to the department, or placing on file in the Sacramento office of the department, on or before the fifteenth day of any posting period, an amendment to their effective price schedule which lowers their price or prices per case or increases their quantity discounts. Such amended price schedule shall become effective at the same time the competitive price for a similar item of the competitive brand shall become effective, or immediately if such competitive price schedule shall have become effective. Manufacturers, rectifiers or wholesalers can meet competitive prices on the same brand, type and size container of distilled spirits by amending their effective price schedule at any time to become effective at the same time the competitive price for the same brand, type and size of container shall become effective, or immediately if such competitive price schedule shall have become effective, or immediately if such competitive price schedule shall have become effective. Competitive schedules expire at the end of the posting period in which they were effective.

A quantity discount filed to meet competition may not be filed in an amount that would reduce the net price of the brand, type or size container below the net price of the competitive brand for the same quantity.

(g) (1) A quantity discount may be offered on a sale of two or more cases, whether original cases or assorted cases, and on each package in excess of two cases on a pro rata basis, except that imported distilled spirits, upon which duty is paid may not be assorted with domestic distilled

spirits, and domestic brandy may not be assorted for discount with any other type of distilled spirits.

The following containers are substantially the same size and for the purposes of quantity discounts are interchangeable: one half-gallon with 1.75 liters, one quart with one liter, one fifth with 750 milliliters, 24 ounces with 750 milliliters, one pint with 500 milliliters, one tenth with 500 milliliters, and one half-pint with 200 milliliters.

(2) All postings, including quantity discount schedules, are public records.

(3) Quantity discounts filed must be understandable and enforceable by the department. Quantity discounts filed in conformity with any of the following three schedules will be presumed to be understandable and enforceable:

(A) Schedule A, Brand Discounts. Quantity discounts may be filed for a single brand. All sizes of the brand are assortable, if so specified. The brand may not assort with another brand in this schedule.

The discounts filed in this schedule shall not be used or combined for quantity with those discounts filed in Schedules B and C.

(B) Schedule B, Multiple Brand Discounts. Quantity discounts may be filed for brands of distilled spirits owned or controlled by the same person when grouped together in the schedule at the same or different discount rates than in Schedules A or C.

The brands and sizes filed in this schedule may also be combined into one or more assortments of brands and sizes as specified. However, if a brand is included in more than one Schedule B assortment, the discount must be identical for each of the sizes and quantities filed in those assortments.

No Schedule B assortment shall be used or combined for quantity with any other Schedule B assortment.

The discounts filed in this schedule shall not be used or combined for quantity with those discounts filed in Schedules A and C.

(C) Schedule C, Special Size Discounts. Quantity discounts may be filed for a single brand or brands of distilled spirits owned or controlled by the same person for not more than any two sizes at the same or different discount rates than in Schedules A or B.

If a brand and size is included in more than one Schedule C assortment, the discount must be identical for each of the sizes and quantities filed in those assortments.

No Schedule C assortment shall be used or combined for quantity with any other Schedule C assortment.

No Schedule C assortment shall be used or combined for quantity with those discounts filed in Schedules A and B.

Filing licensees are to indicate directly below each schedule all explanatory statements they consider applicable to that posting, such as: sizes assort; sizes do not assort; brands and sizes assort; brands and sizes do not assort.

Any quantity discount which does not conform to the schedules set forth above shall be separately filed and clearly identified no later than the first day of December, February, April, June, August or October to be effective on the first day of the next posting period.

If the filing is found to be defective, it will be rejected, setting forth the reasons for the rejection.

(4) Tie-in sales are prohibited. No discount, or any portion thereof, on any distilled spirits in any quantity or quantities, shall in any way, directly or indirectly, be predicated upon, or conditioned upon, the purchase of any other distilled spirits.

(5) Any filing licensee who publishes, mails, delivers, distributes, advertises or in any other way, directly or indi-

rectly, disseminates distilled spirits quantity discount information for any brand, to retail licensees served by him, shall, in any such material, include all quantity discounts filed by him for such brand. If a filing licensee so publishes, mails, delivers, distributes, advertises or in any other way, directly or indirectly, disseminates such information on all quantity discounts filed by him for any brand, he shall disseminate such information to all retailers served by him.

(6) The publication, mailing or delivering of any written material containing less than all of the quantity discounts posted for any brand by a filing licensee shall be deemed a violation of this rule.

(7) The mailing or delivering of written lists of quantity discounts to selective retail licensees rather than to all such licensees served by the filing licensee shall be deemed a violation of this rule.

(8) The publication of all quantity discount schedules filed with the department by a filing licensee, on or before the effective date thereof, in one or more trade journals or industry price books of general circulation among retail licensees in this State, or in parts or trading areas of this State, shall be deemed sufficient compliance with the provisions of subparagraphs (5), (6) and (7) of this paragraph.

(9) Notification to retail licensees of quantity discount schedules by a method other than by publication in a trade journal or industry price book shall be accomplished on or before the effective date of such quantity discount schedules.

(10) The quantity discounts on a brand sold only to one retailer need not be published.

(h) A quantity discount sale is a single order for delivery within two consecutive business days to a licensed retailer at the premises of the distributor, or to the same premises of the licensed retailer at the discount in effect on the day the delivery was commenced. Saturdays, Sundays and holidays are not to be deemed as business days.

(i) In the computation of quantity discounts the word "case" as used in this rule shall mean: 3 full gallons, 6 half-gallons, 12 quarts, 12 packages containing more than one pint but not more than one fifth, 24 packages containing more than one-half pint but not more than one pint, and 48 half-pints. When packages are in metric sizes. "case" shall mean: 6 as to 1.75 liter, 12 as to liters or 750 milliliters, 24 as to 500 milliliters, and 48 as to 200 milliliters.

(j) Any manufacturer, rectifier or wholesaler may at any time file with the department written price schedules showing the price per case and the quantity discount offered on any new brand of distilled spirits, or on any distilled spirits which are not the "same type" as those currently on file by that licensee, to become effective immediately.

(k) No manufacturer, rectifier or wholesaler shall advertise or offer for sale or sell distilled spirits to retailers at a price or quantity discount other than the price or quantity discount provided for by his price schedules or amendments thereto on file with the department.

(*l*) Whenever the fifteenth day of the month falls on a Saturday, Sunday or a legal holiday, the distilled spirits price schedules required to be placed on file in the Sacramento office of the department may be filed or placed in the United States mail addressed to the department not later than the close of the next business day.

(m) Pursuant to an order issued by the department, any distilled spirits price schedule may be changed at any time to reflect changes in federal or state excise taxes on distilled spirits or to comply with the requirements or any order issued by the Federal Government relating to price control.

(n) If any paragraph, sentence, clause or phrase of this rule is for any reason declared invalid, such decision shall not affect the validity of the remaining provisions of this rule.

Appendix E

Before the
Department of Alcoholic Beverage Control
of the State of California

File: 48292

Reg. No. 12952

N-14920

In the Matter of the Accusation

against

Lewis-Westco & Co.
3003 Third Street
San Francisco, Calif.

Still, Rectifiers, Beer & Wine Importer,
Distilled Spirits Importer,
and Beer & Wine Wholesaler,
Respondent.

Under the Alcoholic Beverage Control Act.

Mr. Leraul: Other than moving to have the exhibits attached to my hearing brief admitted into evidence, with the—I don't know if exhibit 1 needs to be; it's for your convenience, being copies of 2 through 5—and I would like those.

Mr. Tipton: No objection.

Adm. Law Judge: Exhibit A is admitted.

Did you have anything further? Anything further before we adjourn as far as you're concerned?

Mr. Leraul: I have no more evidence to put on. Obviously our position is that this rule is invalid. I have covered a lot of this in the brief.

There is one thing I would like to strengthen and add to what is in the brief with regard to assortments. My reading of the Rule 100 suggests that other assortments than single brand line assortments are permitted. Testimony today has established that such assortments are rejected by the department. In fact, they are not. So the brief was addressed to a presumption in favor of single brand discounts, and a favoritism to that type of discount because the way I read the rule, those discounts only have to be filed fifteen days before the effective date, while other types of discounts, whatever they might be, have to be filed thirty days before.

Testimony today, of course, establishes that assortments of cross-brand lines are not permitted at all, and that I think defends the argument we have made in the brief, that this policy is entirely arbitrary. It furthers no interest in the State, and is something that advances the brand owner's interest in selling the whole line and favors them over people with more limited lines.

Such rule also is tying in, a price violation, in view of the fact that the entire California market you cannot assort across brand lines; effectively ties those products together, encourages retailers to purchase along that line, and not to purchase another person's product.

It is also a price discrimination which is entirely unrelated to cost savings which would be a Robinson-Patman violation.

Going back to Rice, of course once you have established that would have been an anti-trust violation, the compensation interests of the state are absent, and are really the wholesaler being promoted over the distiller.

The other points—these again are spelled out in greater detail in the brief, but the price posting itself was struck down by Rice. Rice invalidated the underlying rationale for the whole of Chapter 10, which included all of the price

fixing statutes regarding distilled spirits, including 24756, which is the basis of Rule 100, and the basis for part of this accusation. I mean, the accusation is under Rule 100 and 24756.

The Legislature in the beginning of Chapter 10 declared its policy to fix prices. Rice said that purpose is no longer valid. So Rice has done what Sandy thought it had done; it had eliminated price posting.

And secondly, price posting is a type of price fixing. For sixty days, even though individual wholesalers establish these prices, those prices are fixed by the state for sixty days. It is a power which has not been granted to the department, to fix prices.

The Schenley case discusses that when they attempted to regulate the depth of discount. Similarily here there is no power in the department to lock prices for sixty days and schedule when they can be made.

And those points have been a little more fully explained in the brief. And the respondent would rest.

Adm. Law Judge: Thank you, Mr. Leraul.

Mr. Tipton, anything further?

Mr. Tipton: No. your honor. I would like an opportunity to review the hearing brief and if I could have five days to file a memorandum addressing some of the arguments raised in respondent's brief—other than that, I would rest and the matter could be submitted.

Adm. Law Judge: All right; I'll hold the record open five days for that purpose.

Mr. Leraul: Pardon me. I think to fully explore the issues I would like another five days to respond to additional points that he might raise.

Adm. Law Judge: Very well. Mr. Tipton has the burden, and along with that he gets the final argument, so if

there is anything to respond to Mr. Leraul's brief you'll have five more days after that.

Mr. Tipton: All right, your honor. I may be—after I have the opportunity to review the respondent's hearing brief I may not—I may not choose to file a memorandum. I just want the time. But I understand counsel has five days to respond and I have five days to close.

Adm. Law Judge: All right. Unless there is something further, we'll stand adjourned.

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Attorneys for Respondent

Before the
Department of Alcoholic Beverage Control
of the State of California

File 48292

Reg. 12952

In the Matter of the Accusation Against Lewis-Westco & Co., Respondent.

HEARING BRIEF

FACTUAL BACKGROUND

In May, 1978, the California Supreme Court held that price posting required by Business and Professions Code Section 24755 violated federal restraint of trade laws and was therefore invalid. *Rice v. Alcoholic Beverage Control Appeals Board*, 21 Cal.3d 431 (1978). In *Capiscean Corp. v. Alcoholic Beverages Control Appeals Board*, 87 Cal. App.3d 996 (Jan., 1979) and *Mid Cal. Aluminum, Inc. v. Baxter Rice*, 90 Cal.App.3d 979 (March, 1979) the Court of Appeal, both times relying upon *Rice*, held the wine price maintenance statutes similarly invalid.

In July, 1979, Lewis-Westco & Co. made the sales alleged in the accusation. These transactions can be described in two ways. They can be characterized as being in accordance with Lewis-Westco & Co.'s quantity discount for orders of ten cases or more, except that the products assorted in a manner contrary to the rule. Or these sales can be characterized as being sales of individual cases

below the posted price. Either characterization makes these sales contrary to Rule 100 of the Alcoholic Beverage Control Department.

This leaves only one issue to be determined by the Department in this hearing. Is Rule 100 valid? It is Lewis-Westco & Co.'s position that Rule 100 is not valid, and therefore no fine or action may be taken by the Department against Lewis-Westco's licenses as a result of making the sales described in the accusation.

To assist in the analysis of Rule 100, the remainder of this brief is divided into two sections. The first addresses the deficiencies of that rule with regard to the limitations and presumptions concerning assorting of products for quantity discounts. The second section addresses the deficiencies in the posting requirements.

SUMMARY OF THE ARGUMENT

Since the *Rice* case was decided, California courts have consistently stricken the laws and rules that have the effect of restraining competition in the alcoholic beverage industry where the restraints serve the interest of the oligopolist within the industry and not the interests of the state. *Rice* explicitly struck down retail price fixing for liquor and, as we will discuss shortly, simultaneously struck down all of chapter 10 of the Alcoholic Beverage Control Act. *Capiscean* overturned retail price maintenance as they related to wine. *Mid Cal Aluminum v. Rice* extended *Capiscean* and invalidated wholesale price maintenance provisions as they related to wine. *Norman Williams & Company v. Rice,* 108 Cal.App.3d 348 (1980), which empowered distillers to prohibit interstate trade between Oklahoma wholesalers and importers licensed by this state was similarly stricken.

In each case in the above series, the Courts determined that the statute and rules in question constituted restraint of trade which violated the federal commerce policy of

free competition. After analyzing the state's interest in the law in question, the Courts found the state's involvement to be remote, and that its purpose for the rule was not being achieved thereby.

Rule 100 of Title IV of the California Administrative Code as amended in effect on July 2, 1979, is set forth in Appendix 1 hereto. That rule gives a presumption of validity to quantity discounts which are limited to a single brand or to brands owned or controlled by the same person. That presumption of validity and the preference given to such quantity discounts works a restraint on free competition while achieving no result in which the state has a legitimate interest. To encourage assortments to be limited to brands of a single owner serves only the interest of that brand owner. Such assortments have the same illegal effect as tying arrangements. Such assortments are unrelated to actual savings of the wholesaler from quantity orders and therefore violate the price discrimination prohibitions of the Robinson-Patman Act.

Furthermore, by favoring assortments of a single brand owner's products, Rule 100 goes beyond the Department's authority. The statute fully describes what assortments are prohibited for the purposes of giving quantity discounts. Section 24756 of the Business and Professions Code provides that "domestic brandy shall not be assorted with other distilled spirits for quantity discounts," and that "imported brandy, upon which duty is paid, may be assorted for quantity discounts only with imported distilled spirits upon which duty is paid." No other authority to control, encourage, or discourage assortments is granted to the Department by the Act.

Secondly, any rule limiting assortments based upon who owns the brand is arbitrary, capricious, and in violation of the Constitutional rights of due process and equal protection. Such a rule favors only large distillers who have numerous brands and large wholesalers who carry

complete lines. Such a rule discriminates against the smaller retailer who does not carry complete lines from each brand owner.

Alternately, the accusation can be analyzed as a violation of the requirement to post prices. Such a shift in analysis though does not give the accusation any sounder footing. The requirement to post future prices tends to eliminate price competition and has in fact over the years this law has been on the books tended to eliminate price competition either within a single brand or between leading brands of the same type of distilled spirit. Such a price stabilization effect has been condemned by federal commerce policy, and in *Rice*, *Capiscean*, and *Mid Cal* such price stabilization has been found ineffective in advancing any legitimate state interest.

Furthermore, *Rice* not only invalidated retail price fixing in distilled spirits, it also invalidated all of chapter 10 by declaring the underlying purpose of that chapter to be contrary to federal antitrust policy. The goal of chapter 10 is to stabilize prices. That goal is diametrically opposed to federal antitrust policy. Furthermore, in *Rice* and in the subsequent cases, the courts have held that price stabilization did not achieve the overall goal of the Alcoholic Beverage Control Act of promoting temperance and protecting the small retailers. Since *Rice* has overturned the statutory underpining of Rule 100, it is beyond the Department's authority to prosecute this accusation based upon that rule.

The Department further exceeded its statutory authority by establishing fixed dates and terms when posted prices would be effective. Such price posting constitutes a form of price fixing which has been found to exceed the Department's authority. The fact that wholesalers initially established these prices does not alter the fact that Rule 100 constitutes price fixing.

* * * *

The Supreme Court in *Rice* analyzed the effect of price fixing in accomplishing the state's declared goals. The court began by noting that price fixing is a *per se* violation of the Sherman Act, citing *Schwegmann Brothers v. Calvert Corp.*, 341 U.S. 384, 95 L.Ed. 1035 (1951); and then analyzed whether the goal of the state in fixing prices was of a significance that would justify an exception to the Sherman Act's prohibition on price fixing. In that balancing process, the court ascertained that:

> "what policies are furthered by the State's system of permitting producers to fix retail prices, whether retail price maintenance provisions clearly vindicate those policies and whether and to what degree the policy underlying the Sherman Act is undermined by the State's program." (Page 41)

The Court balanced the declare purpose of the legislature to prevent price competition, which policy is clearly in conflict with the policy underlying the Sherman Act against the effect of price fixing in achieving the goals of temperance and orderly marketing.

* * * *

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1. (continued)

The declared policy referred to in the first sentence of 24749 is set forth in 23001 which reads in full: "This division is an exercise of the police powers of the State for the protection of the safety, welfare, health, peace and morals of the people of the State, to eliminate the evils of unlicensed and unlawful manufacture, selling, and disposing of alcoholic beverages, and to promote temperance in the use and consumption of alcoholic beverages. It is hereby declared that the subject matter of this division involves in the highest degree the economic, social, and moral well being and the safety of the State and of all its people. All provisions of this division shall be liberally construed for the accomplishment of those purposes."

RULE 100 AND BUSINESS AND PROFESSIONS CODE § 24756 VIOLATE FEDERAL ANTITRUST POLICY BECAUSE THEY REQUIRE THE EXCHANGE OF FUTURE PRICE INFORMATION AND TEND TO ELIMINATE PRICE COMPETITION.

The regular exchange of price information between competitors tends to have an anti-competitive effect on pricing. When that exchange covers future prices to be charged to identifiable customers, such exchange may be a *per se* violation of the Sherman Act. As *Rice* noted with regard to retail prices:

> "The price posting system facilitates price fixing among producers. While it may be a *per se* violation of the Sherman Act for competitors to exchange price information on a regular basis (*United States v. Container Corp.* (1969) 393 U.S. 333, 336-337 [21 L.Ed2d 526, 529-530, 89 S.Ct. 510]), producers may readily determine the prices charged by their competitors by referring to the prices filed with the department or to industry publications listing the posted prices." (Pgs. 455-456)

Rule 100 encourages price fixing by requiring each wholesaler to publish the price he intends to charge in advance. Details of the price to be charged each customer are available before the transaction to any wholesaler.

* * * *

Appendix F

United States District Court
Northern District of California

No. C-81-0068 EFL

Enrico's Inc., a California corporation,
d/b/a "Enrico's Sidewalk Cafe,"
Plaintiff,

vs.

Baxter Rice, Director, Department of Alcoholic Beverage Control; Wine and Spirits Wholesalers of Northern California, Inc.
a California association;
Wine & Spirits, Wholesalers of Southern California,
a California association;
Consolidated Enterprises, Inc., d/b/a Rathjen,
a corporation;
Juillard, Inc., d/b/a Juillard Alpha Liquor Company,
a California corporation,
and House of Sobel, a California corporation;
and all other persons similarly situated,
Defendants.

[Filed Nov. 24, 1982]

MEMORANDUM OF DECISION

On cross-motions for summary judgment,[1] this Court confronts the issue of whether the price-posting procedure required by California Business and Professions Code section 24756 and 4 Cal. Admin. Code section 100 (hereinafter collectively referred to as "Rule 100") constitutes a *per se* violation of the Sherman Act, 15 U.S.C. §§ 1, *et seq.* Business and Professions Code section 24756 provides, in relevant part:

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[1]In addition to summary judgment, plaintiff seeks the entry of a permanent injunction.

> Every distilled spirits . . . wholesaler shall file and maintain with the Department [of Alcoholic Beverage Control] a price list showing the prices at which distilled spirits are sold to retailers by the [wholesale] licensee. . . . Sales of distilled spirits to retailers by each distilled spirits . . . wholesaler shall be made in compliance with the price list of the licensee on file with the Department.

Rule 100 provides that each wholesaler who sells or distributes distilled spirits in California must file with the Department of Alcoholic Beverage Control a "written price schedule showing the price per case at which distilled spirits will be sold or distributed, and the discounts offered" by the wholesaler to retailers. 4 Cal. Admin. Code § 100(a). Discounts must be based on quantity and must conform to the formulae set forth in the Rule. 4 Cal. Admin. Code § 100(g). All prices and discounts must be filed at the Sacramento office of the Department by the 15th of the month. On the following day, the filings become publicly available. 4 Cal. Admin. Code § 100(c). It is required that the posted wholesale prices remain in effect for at least a month (4 Cal. Admin. Code § 100(b)), except that a wholesaler has the opportunity to amend its price schedule by *lowering* its price or prices per case or by increasing its quantity discounts to match the lowest submitted price or the highest quantity discount. 4 Cal. Admin. Code § 100(f). Once the posted prices go into effect, the wholesaler is required to sell according to the price schedules or amendments on file with the Department. 4 Cal. Admin. Code § 100(k).

Plaintiff operates a "cafe" which sells distilled spirits in San Francisco, California. Plaintiff has purchased and resold distilled spirits from the wholesaler defendants for over 20 years. Defendants are liquor wholesalers and wine and spirits wholesaler associations. Intervenor, Baxter Rice, is the Director of the California Department of

Alcoholic Beverage Control which, pursuant to statute and its own Rule 100, enforces the challenged regulations.

Plaintiff contends that the requirement that the posted wholesale prices cannot be raised for 30 days is "price-fixing" and, thus, a *per se* violation of the Sherman Act. Plaintiffs rely heavily upon *Sugar Institute v. United States*, 297 U.S. 553 (1936), in which the Supreme Court found an agreement among sugar refiners to adhere to their previously announced prices to be a violation of Section 1 of the Sherman Act.

Defendants posit three arguments in support of their contention that Rule 100 is constitutional. First, they argue that no Sherman Act violation results from the Rule due to lack of the required contract, combination or conspiracy among the wholesalers. Second, defendants contend that the Rule is not a clear *per se* violation of the Sherman Act because it is pro-competitive and neither perniciously affects competition nor lacks redeeming virtue. Finally, the wholesalers argue that Rule 100 is a valid exercise of California's power under the Twenty-First Amendment.

Earlier, Judge Conti refused to apply the state action doctrine enunciated in *Parker v. Brown*, 317 U.S. 341, 350-51 (1942) to insulate Rule 100 from the application of the antitrust laws. The Court found that California's involvement in the price-posting program of Rule 100 was insufficient to bring the program within the ambit of the state action doctrine. This conclusion was largely based upon *California Liquor Dealers v. Midcal Aluminum*, 445 U.S. 97, 105 (1980). *See* Order Re: Motion for Partial Summary Judgment, August 27, 1981.

Discussion

This Court finds that Rule 100 does not violate the Sherman Act as it does not mandate conduct which constitutes an antitrust violation. The United States Supreme Court recently stated

> that a state statute, when considered in the abstract, may be condemned under the antitrust laws only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to comply with the statute.

Rice v. Norman Williams Co., ... U.S. ....., 50 U.S.L.W. 5052, 5054 (July 1, 1982). *See also Seagram & Sons v. Hostetter,* 384 U.S. 25, 45-46 (1966). A possible anticompetitive effect alone is insufficient to invalidate a state regulation; the regulation on its face must irreconcilably conflict with federal antitrust policy. *Norman Williams,* 50 U.S.L.W. at 5053.

Plaintiff's great reliance on *Sugar Institute* is misplaced. In that case, the members of the Sugar Institute met and collectively agreed to a comprehensive set of restrictions of the sugar industry. The Court found the *agreement* to adhere to previously announced prices and terms of sale to be an antitrust violation. *Sugar Institute,* 297 U.S. at 601-602. This agreement constituted price fixing, a *per se* violation of Section 1 of the Sherman Act.[2] *Catalano, Inc. v. Target Sales, Inc.,* 446 U.S. 643, 647 (1980) (*per curiam*).

Plaintiff concedes that the instant situation differs from *Sugar Institute.* Here, no clear agreement in restraint of trade is mandated by Rule 100 and it is each defendant's required unilateral compliance with the Rule which underlies plaintiff's suit.[3] Plaintiff argues, however, that the

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[2]15 U.S.C. § 1 states in relevant part: "Every contract, combination . . . or conspiracy, in restraint of trade . . . is declared to be illegal."

[3]Failure to comply with the requirements of Rule 100 is grounds for suspension or revocation of a license. 4 Cal. Admin. Code § 1.

State of California somehow constitutes the "glue" which creates the required combination for an antitrust violation, seemingly relying upon *California Liquor Dealers v. Midcal Aluminum*, 445 U.S. 97 (1980).

Contract, Combination or Conspiracy

A violation of Section 1 of the Sherman Act cannot be based on unilateral action. *United States v. Colgate & Co.*, 250 U.S. 300, 305-6 (1919); Sullivan, *Antitrust*, p. 311 (1977). The section condemns concerted activity only. One court noted that "[i]t is the ability of a private party by contract, combination, or conspiracy to control the price at which another private party can sell a product which the Sherman Act prohibits." *Serlin Wine & Spirit Merchants, Inc. v. Healy*, 512 F. Supp. 936, 939 (D.Conn. 1981), *aff'd sub nom Morgan v. Division of Liquor Control*, 664 F.2d 353 (2d Cir. 1981).

In *Morgan*, the Second Circuit considered the validity of a Connecticut liquor pricing statute which, among other things, required each manufacturer to post, on a monthly basis, a list of prices for the following month and which required the manufacturer to adhere to those prices set for that month. The state regulation itself established the minimum markup which wholesalers' and retailers' prices were required to reflect. In addition to finding *Parker v. Brown* immunity for the State of Connecticut due to its great involvement in the price arrangement (664 F.2d at 356), the court noted that "the Connecticut statutes do not authorize or compel private parties to enter contracts or combinations to fix prices in violation of § 1 of the Sherman Act." *Morgan*, 664 F.2d at 335.

Similarly, the court in *United States Brewers Association v. Healy*, 532 F. Supp. 1312 (D.Conn. 1982) *rev'd on other grounds*, ... F.2d ....., 43 Antitrust & Trade Reg. Rep. (BNA) 907 (2d Cir. Nov. 1, 1982) rejected a challenge to Connecticut's beer price affirmation statute, finding the challenged statute to require only unilateral conduct. The

contested Connecticut statute required Conecticut brewers and beer importers to post their prices and to adhere to their prices for a one-month period. The statute further required each brewer selling in Connecticut to affirm that its prices were no higher than the lowest price offered to any wholesaler in the three bordering states. Reiterating that "[a]bsent an agreement among private parties, there cannot be a violation of Section one of the Sherman Act" (532 F. Supp. at 1329), the court found that "the beer affirmation statute requires only unilateral action by each brewer and importer" and that "[i]t does not exert 'irresistible economic pressure' on the plaintiff to violate the Sherman Act." *Healy,* 321 F. Supp at 1330.

As in the cases discussed above, plaintiff here relies on *Midcal* to support its contention that unilateral compliance with a state statute is sufficient to constitute a Section 1 violation. This reliance, however, is misplaced.

Explaining its *Midcal* decision, the United States Supreme Court recently stated

> In *California Liquor Dealers v. Midcal Aluminum, Inc.,* 445 U.S. 97 (1980), we examined a statute that *required* members of the California wine industry to file fair trade contracts or price schedules with the State, and provided that if a wine producer had not set prices through a fair trade contract, wholesalers *must* post a resale price schedule for that producer's brands. We held that the statute facially conflicted with the Sherman Act because it *mandated* resale price maintenance, an activity that has long been regarded as a *per se* violation of the Sherman Act. *Id.* at 102-103.

Rice v. Norman Williams Co., ... U.S. ....., 50 U.S.L.W. 5052, 5053 (July 1, 1982) (footnotes omitted) (emphasis in original). The Supreme Court in *Midcal* relied on a long line of cases holding that resale price maintenance is the equivalent of an agreement between wholesalers not to compete. *Midcal,* 445 U.S. at 102.

Clearly, *Midcal* did not eliminate the requirement of an agreement for a Section 1 violation. Although the case was primarily concerned with whether the California wine pricing program was exempted from antitrust liability under *Parker v. Brown* and whether the Twenty-First Amendment provided the state additional power, the Supreme Court found first that "California's system for wine pricing plainly constitutes resale price maintenance in violation of the Sherman Act. [cites]." *Id.* at 103. As one court noted

> Invariably, the Supreme Court has viewed resale price maintenance as involving an implicit agreement in those instances where an implicit agreement was not shown.

United States Brewers Ass'n, Inc. v. Healy, 532 F. Supp. 1312, 1329 (D. Conn. 1982) *rev'd on other grounds*, ... F.2d ....., 43 Antitrust & Trade Reg. Rep. (BNA) 907 (2d Cir. Nov. 1, 1982). Further, the statute at issue in *Midcal*, by its own terms, forced an agreement. The statute *required* the wine producers to fix the minimum prices at which wholesalers could sell the producers' wines. The involvement of the state "was manifested by the requirement that wholesalers and producers set such prices by contract or, in the alternative, that a wholesaler 'post' a price for other wholesalers to follow." *Morgan*, 664 F.2d at 355.

Instead, Rule 100 mandates only unilateral action by each liquor wholesaler, independent activity insufficient to constitute a Section 1 violation. Further, Rule 100 cannot be construed as constituting resale price maintenance since it only requires the liquor wholesalers themselves to adhere to the prices they file.

Shortly before this Court was to have issued its opinion in this case and after the opinion was drafted, the California Court of Appeal for the First District decided *Lewis-Westco & Co. v. Alcoholic Beverage Control Appeals Board*,

1 Civil No. 54605 (October 22, 1982). The California Court of Appeal held Section 24756 of the Business and Professions Code and Rule 100 to be violative of Section 1 of the Sherman Act. In reaching this conclusion, the court relied primarily upon *Rice v. Alcoholic Beverage Control Appeals Board,* 21 Cal.3d 431 (1978), in which the California Supreme Court invalidated price maintenance provisions which required distilled liquor wholesalers to set minimum retail prices. *Rice,* 21 Cal.3d at 444-459.

This Court does not find *Rice* to be persuasive since the instant situation, unlike that in *Rice*, does not involve resale price maintenance which would provide evidence of an agreement as required for a Section 1 violation. More on point are the federal cases of *Morgan* and *Healy,* discussed above, which convince this Court that no facial restraint appears from the challenged regulations.

In light of the *Lewis-Westco* decision, this Court requested further briefing and argument from the parties regarding whether this Court's opinion was rendered moot. All parties, except intervenor Baxter Rice, argued strenuously that this Court should issue its opinion. In doing so, the Court notes that the defendants herein were denied the opportunity to intervene in the *Lewis-Westco* case.

Although this decision disposes of the major issues in the action, there remains plaintiff's allegation of private price-fixing. This contention is unrelated to plaintiff's challenge to the facial validity of Rule 100 since plaintiff admits that the statute in no way mandates private price-fixing.

The question of whether Rule 100 is facially invalid due to conflict with Section 1 of the Sherman Act raises, in the opinion of this Court, important antitrust issues. This Court's order clearly involves a controlling question of law as to which there is substantial ground for difference of opinion, as evidenced by the contrary conclusions reached

by the California Court of Appeal and this Court. This Court, relying primarily on federal district court and Second Circuit decisions, concluded differently than the state court, which largely relied on state court precedent. This case involves purely federal issues on which this Circuit has yet to speak. Accordingly, this Court finds this order, based upon a single legal issue, to be an ideal candidate for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

Since Rule 100 states no *per se* violation of Section 1 of the Sherman Act, summary judgment for the defendants is granted. Since this Court finds no agreement on the part of the defendants, it is unnecessary to reach defendants' other arguments.

It is so ordered.

Dated: November 24, 1982.

/s/ EUGENE F. LYNCH
United States District Court
Judge

No. 82-1793

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD,
and DIRECTOR OF THE DEPARTMENT OF
ALCOHOLIC BEVERAGE CONTROL,
Petitioners,

vs.

LEWIS-WESTCO COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

REASONS FOR DENYING THE WRIT

None of the factors that make a case important to the administration of law will be presented by review of this case. The Decision of the California Court of Appeal correctly applied well established principles of antitrust law to determine that California's wholesale liquor price posting law is in conflict with federal law. Reaffirmation of that decision is not necessary to resolve other pending cases or to resolve conflicts between courts.

The California Court of Appeal annulled the order of the Alcoholic Beverage Control Appeals Board in which it

reluctantly upheld sanctions against respondent, Lewis-Westco & Company, for violations of Business & Professions Code Section 24756.[1] That code section required liquor wholesalers to file with the Department of Alcoholic Beverage Control the prices they would charge during a period subsequent to the filing. During the posting period prices could not be adjusted except to match a lower posted price of another wholesaler.

The Court of Appeal observed that:

> Under the challenged statute, licensed wholesalers are required to announce their prices in advance by posting them with the Department and, under sanction of penalty, are prevented from making sales to retailers at different prices.
>
> . . .
>
> Moreover, as the [Appeals] Board concluded, subdivision (f) of the implementing rule literally "invites periodic examination of the price lists on file" thus assuring other competitors that the filing licensee will not sell its product to anyone at a lower price. In plain effect, the mandated price posting, coupled with the regulatory compliance condition, openly sanctions and promotes an exchange of price information among competitors calculated to produce a uniform price structure vividly demonstrating the absence of free and unfettered competition in the wholesale liquor industry.
>
> *Lewis-Westco & Company v. Alcoholic Beverage Control Appeals Board,* (1982) 136 C.A.3d 829, 835-836.

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[1]While the Board found that "the statute and rule in question [§ 24756 and Title 4, California Administrative Code § 100] are part of the scheme for the fixing of prices", (Appendix to Petition for Certiorari p. 37), it affirmed the Department's decision because § 3.5 Article III of the California Constitution prohibits the Board from declaring a statute invalid.

Upon this factual basis the Court of Appeal held that Section 24756 was intended and did restrain horizontal price competition. *Lewis-Westco,* p. 836. That holding is consistent with a long line of decisions by this court. In 1922 this court found a central exchange to which participants divulged the price at which they had sold their product to identified customers and for which penalties were imposed for failure to supply such information violated the Sherman Act. *United States v. American Linseed Oil Co.,* 262 U.S. 371 [67 L.Ed. 1035] Again, in 1968 this court found that exchange of pricing information which identified the customers violated the Sherman Act. *United States v. Container Corp. of America,* 393 U.S. 333 [21 L.Ed.2d 526]. Since Section 24756 required all sales to be at the posted price, there is sufficient identification of the customers to bring the present case within the rule announced in *American Linseed Oil* and *Container Corp.* In *Sugar Institute v. United States,* (1935) 297 U.S. 553 [80 L.Ed. 859] this court held that such an exchange of future prices together with enforced compliance with such prices was illegal.

> The unreasonable restraints which defendants imposed lay not in advance announcements, but in the steps taken to secure adherence, without deviation, to prices and terms thus announced. It was that concerted undertaking which cut off opportunities for variation in the course of competition however fair and appropriate they might be. (At p. 601)

This court has characterized the *Sugar Institute* case as holding such enforced price posting arrangements were *per se* violations of the Sherman Act. *Catalano, Inc. v. Target Sales, Inc.* (1980) 446 U.S. 643, 647 [64 L.Ed.2d 580]

The California Court of Appeal found that the anti-competitive evil of Section 24756 was the stabilization of liquor prices, *Lewis-Westco* p. 839 and interference with price competition. *Lewis-Westco* p. 835. More than 40 years ago this court first held such price stabilization, no matter how reasonable the stabilized prices were, constituted a *per se* violation of the Sherman Act. *United States v. Socony-Vacuum Oil Co.* (1940) 310 U.S. 150, 222 [84 L.Ed. 1129] Since then this court has consistently adhered to that decision. See: *Arizona v. Maricopa Medical Society* (1982) ..... U.S. ..... [73 L.Ed.2d 48], *United States v. Parke Davis & Co.* (1960) 362 U.S. 29 [4 L.Ed.2d 505].

In *Rice v. Norman Williams Co.* (1982)..... U.S. ..... [73 L.Ed.2d 1042] this court reviewed the circumstances where the Sherman Act would preempt state statutes:

> In determining whether the Sherman Act preempts a state statute, we apply principles similar to those which we employ in considering whether any state statute is preempted by a federal statute pursuant to the Supremacy Clause. p. 1049.

The court went on to hold that:

> Such condemnation will follow under § 1 of the Sherman Act when the conduct contemplated by the statute is in all cases a per se violation. p. 1051.

The cases mentioned above establish that an enforced exchange of future price information coupled with enforced compliance with those announced prices is precisely the type of *per se* violation of the Sherman Act which will preempt a state statute. In addition the California Legislature has forthrightly stated that the purpose of Section 24756 is

to stabilize prices[2], which purpose is always contrary to the Sherman Act.

In reaching its decision the California Court of Appeal correctly applied well established principles of law that have been consistently developed by this court over the past six decades. This case presents no issues that will assist this court in clarifying new issues of antitrust law. In an express effort to stabilize prices the California Legislature established the type of price information exchange that has been held to be a *per se* violation of the Sherman Act. That pricing arrangement is preempted by the Sherman Act unless it is exempted as state action or by virtue of powers granted the state by the Twenty-first Amendment.

The second and third questions for review listed by the petitioner invite this court to reiterate the amount of involvement required by a state before its legislative enactments are outside of the scope of federal antitrust law because action required under such legislation involves acts of the state. Again this issue is not novel nor are

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[2]The Legislative purpose for Section 24756 and the other provisions of Chapter X of the Alcoholic Beverage Control Act is set forth in Business & Professions Code Section 24749 which reads in full: "It is the declared policy of the State that it is necessary to regulate and control the manufacture, sale, and distribution of alcoholic beverages within this State for the purpose of fostering and promoting temperance in their consumption and respect for and obedience to the law. In order to eliminate price wars which unduly stimulate the sale and consumption of alcoholic beverages and disrupt the orderly sale and distribution thereof, it is hereby declared as the policy of this state that the sale of alcoholic beverages should be subjected to certain restrictions and regulations. The necessity for the enactment of the provisions of this chapter is, therefore, declared as a matter of legislative determination."

decisions of the lower courts in conflict. This court, in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.* (1980) 445 U.S. 97 [63 L.Ed.2d 233], held that unsupervised private pricing which is enforced by the state does not constitute an act of the state.

> The State simply authorizes price-setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in any "pointed reexamination" of the program [footnote omitted]. The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement. As Parker teaches, "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful. . . . 317 U. S. at 351 *Midcal* pp. 105-106

In *Midcal* this court set out a two part test for determining whether a state was sufficiently involved in a restrictive trade policy to immunize that activity from federal antitrust law.

> First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy"; and second, the policy must be "actively supervised" by the State itself. (cites omitted) *Midcal* p. 105

Petitioners urge that Section 24756 involves state action since wholesalers are compelled to post their own prices rather than prices binding upon others. Petitioner's Brief

pp. 5-7. The fact that the state compelled posting of prices did not prevent review of the state's legislation under anti-trust principles in *Midcal* nor in *Rice v. Alcoholic Beverage Control Appeals Board* (1978) 21 Cal.3d 431. Nor does the selection of who sets an anti-competitive price affect our analysis. Whether one wholesaler sets prices for every other wholesaler; the wholesalers meet to agree upon an acceptable price; or the wholesalers merely exchange so much information concerning their future prices that acting in their own interests they will invariably set identical prices; does not alter the involvement of the state. The particular method by which wholesalers are authorized under state legislation to achieve anti-competitive prices does not affect the involvement of the state.

If we compare the involvement of the state in effectuating the price stabilization policy under Section 24756 with that used in the legislation condemned in *Midcal,* we find that the involvement of the state is exactly the same. In the *Midcal* case, the state designated the private party who would set prices, required that those prices be posted and enforced any deviation by wholesalers from the posted prices. In Section 24756 the state designates more people as price setters but still designates who will establish liquor prices. It accepts those prices for posting and enforces compliance. There is no pointed reexamination of those prices or the appropriateness of stabilizing prices at the levels achieved under Section 24756. Thus the *per se* anti-competitive pricing required by 24756 is not established by an act of the state nor is it subject to pointed reexamination.

The Department's argument that prices are set by wholesalers for themselves rather than by selected wholesalers

for all others is not on point as the California Court of Appeal noted:

> Nor do we comprehend the Department's insistent claim that it is the individual wholesaler who sets his own price rather than the state or others. It is the very existence of an essentially private price fixing arrangement under statutory sanction which is repugnant to the Sherman Act policies. As long declared: "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful. . . ." (*California Retail Liquor Dealers v. Midcal Aluminum, supra,* 445 U.S. 97, 104, 106 [63 L.Ed.2d 233, 242, 243-244 quoting *Parker v. Brown, supra,* 317 U.S. at p. 351 87 L.Ed. at 326]) *Lewis-Westco,* p. 847

In his attempt to bring this case before a fifth tribunal the Attorney General for the first time argues that the Wilson Act and the Webb-Kenyon Act (27 U.S.C. §§ 121, 122) indicate that Congress intended to "remove commerce clause protection from liquor". Petitioner's Brief p. 18. The Attorney General's construction of these Acts is directly contradicted by all of the decisions construing those Acts and by the historical background of the Twenty-first Amendment. This court has described the relationship between the Twenty-first Amendment and the Wilson and Webb-Kenyon Acts in *Craig v. Boren* (1976) 429 U.S. 190 [50 L.Ed.2d 397].

> The wording of Section 2 of the Twenty-first Amendment closely follows the Webb-Kenyon and Wilson Acts, expressing the framers' clear intention of constitutionalizing the Commerce Clause framework established under those statutes. at pp. 205-206.

It has been held that the language of the Twenty-first Amendment:

> [S]o closely follows the Webb-Kenyon Act as to lead us to the conclusion that it was copied therefrom and it should receive the same construction as that given the last mentioned act. *Dugan v. Bridges,* 16 F. Supp. 694, 706 (D. N.H. 1936)

The Wilson Act was enacted in 1890 in response to this court's decision in *Leisy v. Hardin,* (1890) 135 U.S. 100 [34 L.Ed 128] which undercut the theoretical underpinnings of the *License Cases,* (1847) 5 How. 504, 579. After the *Leisy* decision the power of states to regulate trade of alcoholic beverages within their borders was in question with respect to any liquor imported from another state. The passage of the Wilson and Webb-Kenyon Acts was intended to restore authority to the states to regulate trade in liquor within their borders. See *Craig v. Boren,* supra, 429 U.S. at 205

> To correct the great evil which was asserted to arise from the right to ship liquor into a state through the channels of interstate commerce, and there receive and sell the same in the original package, in violation of state prohibitions, was indisputably the purpose which led to the enactment of the Wilson Act (Act of Congress of August 8, 1890, 26 Stat. at L. 313, chap. 728, Comp.Stat. 1913, § 8738), forbidding the sale of liquor in a state in the original package even though brought in through interstate commerce, when the existing or future state laws forbad sales of intoxicants. . . .
>
> . . .
>
> Reading the Webb-Kenyon law in the light thus thrown upon the Wilson Act and the decisions of this court which sustained and applied it, there is no room for doubt that it was enacted simply to extend that

> which was done by the Wilson Act; that is to say, its purpose was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through interstate commerce in states contrary to their laws, and thus in effect affording a means by subterfuge and indirection to such laws at naught. *James Clark Distilling Company v. Western Maryland Railroad Company,* (1916) 242 U.S. 311, 323-324 [61 L.Ed. 326]

Petitioner's fourth question for review requests that this court change its well-established interpretation of the legislative history behind the Wilson and Webb-Kenyon Acts and to construe them as an abandonment of Congress' Commerce Clause powers over liquor. At the same time, though, petitioner acknowledges that the Sherman Act, which is an exercise of Congress' Commerce Clause power, applies to liquor merchants. See: *Schwegmann Brothers v. Calvert Distillers Corp.,* (1950) 341 U.S. 384, [95 L.Ed. 1035] and *Midcal, supra.* Since acts of the state are not limited by the Sherman Act, *Parker v. Brown* (1943) 317 U.S. 341 [87 L.Ed. 315], in effect the interpretation petitioner seeks to apply to the Wilson and Webb-Kenyon Acts is that they authorize states to license private violations of the Sherman Act or that these Acts eliminate the need to comply with the second test for state action enunciated by this court in *Midcal.* That interpretation is not only contrary to all of the cases that have applied the Wilson and Webb-Kenyon Acts, that have interpreted the relationship between those Acts and the Twenty-first Amendment, the historical background of those Acts, but would also require this court to overturn its holdings in *Schwegmann Brothers v. Calvert Distillers Corp.* and *Midcal.*

Finally, in the fifth question listed for review the petitioner urges this court to reverse the California Court of Appeal's finding that the purpose of Section 24756 is "to promote temperance and orderly marketing conditions", *Lewis-Westco* at p. 838. Not only is the California Court of Appeal's finding correct but review of that finding will not significantly advance the administration of law.

Petitioner urges without authority or evidence that "The main state interest is the prevention of price discrimination". Petitioner's Brief p. 8. On page nine he suggests that "posting also helps prevent predatory pricing and aids pool buying by retailers . . .".

The location of Section 24756 tells us that petitioner is wrong. The Alcoholic Beverage Control Act prohibits price discrimination in Section 25503 which is a part of the Tied-House restrictions of Chapter XVII. If the Legislature intended to detect price discrimination through price posting, it would have enacted the posting requirements as part of Chapter XVII, not as part of Chapter X. Secondly, the Legislature has clearly stated its purpose for enactment of Section 24756 which was to "eliminate price wars", Business & Professions Code Section 24749. Courts have repeatedly held that price stabilization and promoting temperance were the purposes for the retail price provisions of Chapter X. *Rice v. Alcoholic Beverage Control Appeals Board* (1978) 21 Cal.3d at p. 451, *Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control* (1966) 65 Cal.2d 349 at p. 360. The court in *Schenley Affiliated Brands Corporation v. Kirby,* (1971) 21 Cal.App.3d 1977, 1984 observed that:

> Although somewhat different constitutional and economic arguments are available, the statutory demand

for adherence to posted wholesale prices is supported in part by the constitutional and economic considerations which validated the consumer price maintenance law.

The Attorney General's invented purpose is further rebutted by the second sentence of Section 24756 which regulated assortments with domestic brandy which is of no assistance in monitoring price discrimination. That sentence is simply a pricing regulation.

Further support for the finding that this statute is merely price stabilization legislation is the identity of those who have sought to intervene or file amicus briefs in this case. Neither organizations concerned with the sobriety of society nor organizations of small retailers about to face chaotic markets have sought to participate. Rather it has been the California Beer Wholesalers Association and the Wine & Spirits Wholesalers of California who have sought to participate—the very people who the Attorney General argues are being restricted by this statute. See Petitioner's Brief p. 6.

Review by this court of the decision of the California Court of Appeal is not necessary. That decision is consistent with the decisions of this court. The Attorney General argues that that decision is contrary to one issued one month later by Judge Lynch of the District Court of the Northern District of California in *Enrico's v. Rice, et al.* (D.D. Cal.No. C 81-0068EFL) and that a writ is necessary to resolve that conflict. A moment's analysis indicates that is not true. In that action plaintiff sought to enjoin enforcement of Section 24756 and to have it declared invalid. If Judge Lynch's decision was not moot when rendered, it now is because no effective remedy can be

effectuated by the federal courts in that case. Should this court grant a writ and reaffirm the California Court of Appeal decision, the relief sought by plaintiffs in *Enrico's* will have been achieved. That same result, though, can be achieved by denial of a writ in this case.

Dated: June 30, 1983

LELAND, PARACHINI, STEINBERG, FLINN, MATZGER & MELNICK

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No. 82-1793

In the Supreme Court of the United States

OCTOBER TERM, 1982

ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD and DIRECTOR OF THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL

Petitioner,

v.

LEWIS-WESTCO COMPANY

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEALS

Brief of the State of Oregon, Amicus Curiae, in Support of the Petition of the State of California for a Writ of Certiorari

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ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEALS

Brief of the State of Oregon, Amicus Curiae, in Support of the Petition of the State of California for a Writ of Certiorari

AMICUS BRIEF

Amicus respectfully urges the Court to issue a writ of certiorari to review the judgment and opinion of the California Court of Appeals in *Lewis-Westco Company v. Alcoholic Beverage Control Appeals Board*, 136 Cal App3d 829, 186 Cal. Rptr. 552 (1982).

STATEMENT OF INTEREST

The State of Oregon regulates the intrastate activities of the liquor industry pursuant to statutes enforced by a state administrative agency which has promulgated regulations requiring wholesalers to post liquor prices. Oregon presents this amicus brief, sponsored by the Oregon Attorney General, on behalf of the Oregon Liquor Control Commission.

Oregon has a particular interest in this case. The California Court of Appeals erroneously has held that California statutes and regulations, similar to those enforced by the Oregon Liquor Control Commission, have the effect of establishing a system of price-fixing which violates the Sherman Antitrust Act. Officials of the Oregon Liquor Control Commission are defendants in federal district court litigation challenging Oregon's liquor price-posting regulations as violative of the Sherman Antitrust Act. *Miller, et al. v. Hedlund* (D. Or. No. 78-259-FR).

Oregon's price posting regulations, as do those of California, prohibit price discrimination and require liquor wholesalers to post their price schedules with a state agency. The price schedules are public records. In certain instances, the regulations further require that the posted price remain in effect for specific, minimum periods of time. Plaintiffs in the

Oregon litigation contend that the regulations effect unlawful price fixing.

Like California law, however, Oregon's regulations neither compel nor enforce agreement among wholesalers regarding prices. These regulations only require liquor wholesalers to take the action of posting their prices in order that the state might achieve permissible objectives of economic regulation. If allowed to stand, the misanalysis of the pertinent issues by the California court will be spread across the country to cast unwarranted doubt upon the regulatory schemes of Oregon and the other states which similarly regulate the liquor industry.

SUMMARY OF ARGUMENT

Petitioners appropriately and persuasively seek this Court's review of several significant issues which now frequently arise when state liquor regulations are attacked as being in restraint of trade. Amicus writes to draw this Court's attention to the significance of the California court's erroneous analysis of the question of whether the state action exemption from the proscriptions of the Sherman Antitrust Act should have been applied. The Court should grant certiorari to address this pivitol jurisdictional issue which is a matter of immediate concern to the states and question of first impression in this Court.

The Court should grant review to make it clear that the two-pronged test of the "state-action exemption" enunciated in *Parker v. Brown*, 317 U.S. 341 (1943) and discussed in *California Liquor Dealers v. Midcal Aluminium*, 445 U.S. 97 (1980) is not the proper test for exemption in cases such as this *where state administrators are sued* to restrain their enforcement of state liquor regulations. Even if this Court is convinced the two-pronged test of "state action" should be applied when state administrators are forced to defend their right to enforce state liquor regulations, the Court should take this opportunity to hold that the "active state supervision" prong of that test can be met solely by the rational relationship of the regulations to the promotion of state statutory policies. The Court should also articulate the appropriate standard of judicial review in cases such as this. The Court should reject any test which requires judicial weighing of the value of such policies or an assessment of the degree of the utility of the regulations which purportedly effect those policies. The Court should grant certiorari review to announce that official state action pursuant to state statutes and regulations qualifies for exemption from the Sherman Antitrust Act if the state demonstrates that its statutes and regulations are rationally related to the advancement of legitimate state policies.

ARGUMENT

SUPREME COURT REVIEW SHOULD BE GRANTED TO RESOLVE CONFLICTS IN DECISIONS REGARDING THE EXEMPTION OF STATE ACTION FROM THE PROSCRIPTIONS OF THE SHERMAN ANTITRUST ACT.

The petition for writ of certiorari outlines the several analytical errors of the California Court of Appeals and lists a number of significant reasons which should prompt this Court to grant review of the California court's holding that the state's liquor price-posting laws and regulations violated the Sherman Antitrust Act. Amicus agrees with the many points raised in the petition. However, we limit our brief to the jurisdictional error and implications of the lower court's holding that the state action exemption from the Sherman Antitrust Act did not apply because the state was insufficiently involved in its price-posting system of liquor regulation.

Decisions of this Court have established two requirements for "state action immunity" from the antitrust provisions of the Sherman Antitrust Act as interpreted in *Parker v. Brown*, *supra*. The challenged restraint of trade must be "one clearly articulated and affirmatively expressed as state

policy" and the policy must be "actively supervised" by the state. *City of Lafayette v. Lousiana Power & Light Co.*, 435 US 389 (1978) (opinion of Brennan, J.). This Court addressed the question of the application of the *Parker v. Brown* criteria in the context of its review of California's wine-pricing system in *California Liquor Dealers v. Midcal Aluminum*, 445 US 97 (1980) [hereinafter referred to as "Midcal"]. The Court held that the California program did not meet the second requirement for *Parker* immunity because the state merely authorized price setting and enforced prices established by private parties. 445 US at 105-106. However, as the petition for certiorari in the present case correctly points out, "* * * the meaning of 'active state supervision' is a subject of conflict in the lower courts." (Pet., 16).

The petition notes the conflict between Ninth Circuit and Second Circuit decisions on this question. (*Id.*). Amicus State of Oregon also notes that within the Ninth Circuit alone there is considerable disagreement among the decisions respecting the proper application of *Midcal* to state defendants.

As petitioner states (Pet., 16), the Ninth Circuit held in *Miller v. Oregon Liquor Control Commission*, 668 F2d 1222 (9th Cir. 1982), that a state must be involved in the actual setting of the prices charged for liquor in order to qualify for the state exemption when it is sued under the Sherman Antitrust Act.

This case, presently pending in the district court on remand under the title *Miller v. Hedlund*, *supra*, arose in 1978 when two tavern owners sued Oregon and several manufacturers and wholesalers of liquor and alleged a conspiracy and restraint of trade, in violation of section 1 of the Sherman Antitrust Act. The complaint asked for damages and injunctive relief. The plaintiffs alleged that the defendants had sought to raise and stabilize beer and wine prices by permitting and requiring beer and wine wholesalers to post their price changes ten days before the changes went into effect, thereby allowing exchange of that information. The conduct sought to be enjoined was predicated upon state administrative rules. These rules have been in effect for many years. The price posting regulations expressly refer to the enforcement of the state statutes prohibiting "financial assistance" by wholesalers of retailers and include separate provisions which require that prices be uniform for the same class of trade buyers. One of the aims of the regulations is to maintain the three-tiered system of the liquor industry in Oregon; another goal is to protect retailers from predatory pricing tactics which might otherwise be employed by wholesalers seeking to control retailers. The states' general regulatory objective in requiring price-posting are well summarized in California's petition for certiorari at pages 4-5.

The Ninth Circuit, citing *Midcal*, held, on a bare record, that the Oregon regulations were not entitled to exemption from Sherman Antitrust Act proscription because Oregon did not "actively supervise" its own policies:

> "* * * Oregon mandates the posting of prices to be charged by each wholesaler, but does not in any way review the reasonableness of the prices set. While the Commission 'may reject any price posting which is in violation of its rules,' Rule 210(1)(b), the effect of the rule is simply to effectuate the price posting and the prohibitions on quantity discounts and transportation allowances. It does not provide for government establishment or review of the prices themselves. * * *" *Miller v. Oregon Liquor Control Commission*, *supra*, 688 F2d at 1227 (1982).

Thus, in *Miller v. Oregon Liquor Control Commission*, the Ninth Circuit, like the California court in the present case extended *Midcal* and applied the "state action" exemption to a determination whether the state *itself* is exempt from actions predicated upon an alleged violation of the Sherman Antitrust Act. This extension of *Midcal* was erroneous.

The Ninth Circuit's *Miller* decision is a clear departure from the approach it took in *State of New Mexico v. American Petrofina, Inc.*, 501 F2d 363 (1974). In *American Petrofina*, New Mexico sued an oil company and five other asphalt suppliers for alleged antitrust violations. The oil company counterclaimed, alleging that the state and some of its

political subdivisions conspired as consumers to fix prices and eliminate competition among themselves in violation of the Sherman Antitrust Act. The state asserted immunity from the Sherman Antitrust Act in response to the counterclaim. Shell argued that, under *Parker v. Brown*, *supra*, the state's immunity extended only to situations where the legislature had mandated an alternative to competition as the highest good of an industry. The Ninth Circuit rejected Shell's argument. The court said that the "legislative mandate" would be useful in determining whether an antitrust defendant or regulatory scheme was actually an instrument of the state. The court held, however, that in an antitrust suit directly against a state, there could be no doubt that conduct by the state was at issue. 501 F2d at 369-370. In such a case, the court concluded, a state was "not covered" by sections 1 and 2 of the Sherman Antitrust Act. 501 F2d at 371.

In *Ronwin v. The State Bar of Arizona*, 686 F2d 692 (1981), the Ninth Circuit had applied the two-pronged test of state action in a Sherman Antitrust Act suit to determine whether the state bar of Arizona was qualified for antitrust immunity. *Id*, 686 F2d at 697. The plaintiff had failed the Arizona bar examination and the Arizona Supreme Court had refused to review the exam. This court had denied certiorari. *Ronwin v. Committee on*

Examinations and Admissions, 419 US 967 (1974). Ronwin then had claimed a violation of section 1 of the Sherman Antitrust Act on the ground that the defendant had illegally restricted competition among attorneys practicing in Arizona because, allegedly, the committee's grading system was based upon admission of a predetermined number of persons, without reference to achievment by each bar applicant of a pre-set standard of competence. Contrary to its decision in *American-Petrofina* and purportedly on the authority of subsequent Supreme Court decisions including *Midcal*, the Ninth Circuit did not find sufficient state action merely because the committee was established by Supreme Court rule and was composed of members selected by the Arizona Supreme Court:

> "* * * Although the defendants in the United States Supreme Court's state-action decisions were public bodies, or subdivisions of the state, that did not end the Court's analysis. The Court still looked to see whether the challenged restraints were clearly articulated and affirmatively expressed as state policy and were actively supervised by the state acting as sovereign. * * *" *Ronwin v. The State Bar of Arizona*, *supra* 686 F2d at 697 (1981).

Judge Ferguson, in dissent, properly criticized the application of the two-pronged test in an antitrust action against a state agency. After taking note of Tenth Amendment problems posed by the majority's holding, Judge Ferguson said

> "The majority applies erroneous standards to determine whether an agency of the state * * * is exempt from antitrust laws. The majority incorrectly applies a test of compulsion by asking whether the action of the Committee was *required* by the state supreme court. The majority answers: Like the defendants in *Goldfarb*, [*v. Virginia State Bar* 421 US 773 (1975)] the defendants here have no statute or Supreme Court Rule to point to as directly *requiring* the challenged grading procedure." Maj. Op., *ante*, at 696 (emphasis added).
>
> "However, the test of compulsion in *Goldfarb*, *supra*, applied only to *private conduct* of the county bar association and to the State Bar's joinder in that private conduct. * * *" *Id*, 686 F2d 705-06. (Emphasis supplied).

Judge Ferguson then appropriately quoted Areeda, *Antitrust Immunity for "State Action" After LaFayette*, 95 Harv. L. Rev., 435, 438 n. 19, 445 n. 49 (1981):

> "Compulsion is not necessary in cases of *public* defendants. Immunity for decisions of subordinate agencies or officials cannot depend on an explicit command from the Legislature; delegation of governmental powers necessarily includes the discretion to make decisions not compelled by the Legislature."

Judge Ferguson also questioned the majority's belief that an additional element of the immunity test was whether the state policy is "actively supervised by the state itself." 686 F2d at 706, n. 4. He noted Professor Areeda's observation that this Court had not yet required that governmental acts be supervised by the state and correctly stated:

"The cases cited by the majority did not apply the supervision test to public defendants." *Ronwin v. The State Bar of Arizona, supra*, 686 F2d at 706, n. 4.

Since the Ninth Circuit's *Ronwin* decision, at least one U.S. District Court within the Ninth Circuit has followed the approach taken in *American Petrofina* and Judge Ferguson's *Ronwin* dissent in recognizing state action immunity when the state itself is the defendant. *Deak-Perera Hawaii v. Dept. of Transp., etc.*, 553 F. Supp. 976 (1983). In *Deak-Perera*, the plaintiff alleged that the Hawaii Department of Transportation and its state officials had violated federal antitrust laws by issuing an exclusive lease for the foreign exchange concession at the Honolulu International Airport. Judge Pence correctly ruled that the two-pronged test was not relevant to determine state-action immunity where the state itself was the defendant:

"More recent Ninth Circuit cases and the United States Supreme Court cases since 1974 have indicated that there now is even more than a 'valid argument' against 'automatically' giving counties and cities state-action immunity. Such political subdivisions may be subjected to the *Midcal* analysis. However, nothing since *Petrofina* has erroded its central theme that when it is the state itself being sued for acting, then it is entitled to *Parker* immunity against the Sherman Antitrust Act and the *Midcal* analysis is 'unnecessary'." 553 F. Sup. at 982.[1]

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[1]Nevertheless, Judge Pence applied the two-prong test and demonstrated that it was unnecessary in an antitrust action brought against the state:

(Continued on next page)

The approach taken by the district court properly comports with the rationale of *Parker v. Brown*. The Ninth Circuit's reasoning in *Miller v. Oregon Liquor Control Commission*, *supra* does not. The rationale of that decision may be reviewed by this court when it reviews the Ninth Circuit's decision in *Ronwin* under the title of *Ronwin v. Hoover*, (S Ct No. 82-1474) *cert. granted*, ___ US ___ , 51 USLW 3825 (May 16, 1983). Because the California Court of Appeals employed a similarly questionable rationale in the decision review of which is sought here, the writ of certiorari should be allowed to settle the question of state immunity from antitrust suit in the context of liquor law enforcement.

If the Court deems application of the two-pronged test of "state action" appropriate even when a Sherman antitrust action is directed against state agencies or state administrators acting in their official capacities, the Court should grant review in this case. The Court then should decide whether a state must demonstrate, as *Midcal* arguably seems to require, a pointed reexamination of the effects which the regulations have on the economy. Amicus

(Continued from previous page)

"For reasons heretofore stated, this court has considered and applied a *Midcal* analysis. The application of the superfluous analysis confirms this court's earlier conclusion. When the state is acting through one of its instrumentalities, the *Midcal* analysis logically should be satisfied automatically. The *Midcal* two-pronged test having been met, the DOT's actions are entitled to the same *Parker v. Brown* immunity to antitrust suits as the state."

contends that it is inappropriate to require states to demonstrate "active supervision" in these terms. A state statute is not preempted by the Sherman Antitrust Act simply because the state's scheme might have an anti-competitive effect. *Rice v. Norman Williams*, ___ U.S. ___ , 73 L. Ed2d 1042, 102 S. Ct. 3294 (1982). As pointed out by Justices Rehnquist and O'Conner in their dissenting opinion in *Community Communications Co. v. Boulder*, 455 U.S. 40, 66, 70 L. Ed2d 810, 828, 102 S. Ct. 835 (1982):

> "* * * Competition simply does not and cannot further interests that lie behind most social welfare legislation. Although state or local enactments are not invalidated by the Sherman Antitrust Act merely because they may have anti-competitive effects, *Exxon Corp. v. Governor of Maryland*, *supra*, at 133, 57 L. Ed2d 91, 98 S. Ct. 2207, this court has not hesitated to invalidate such statutes on the basis that such a program would violate the antitrust laws if engaged in by private parties." (Cases cited).

Assuming that state defendants must satisfy the two-pronged test to acquire the exemption from Sherman Antitrust Act suits, it should be sufficient for them to demonstrate that their pertinent state statutes and regulations are rationally related to legitimate state economic objectives. The courts should not be permitted "to substitute their social and economic beliefs for the judgment of legislative bodies, who are likely to pass laws." *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963). Nor should a

court be permitted to weigh how well state regulations advance state purposes, so long as a rational relationship can be demonstrated.

CONCLUSION

The current state of the law, at least in the Ninth Circuit, with respect to the state's right to regulate the liquor industry is fraught with uncertainty. Cases construing Section 2 of the Twenty-First Amendment appear to have conferred broad authority on the states to regulate the liquor industry within their borders. However, since *Midcal*, there has been uncertainty concerning the reach of federal power under the Commerce Clause and the Sherman Antitrust Act. Furthermore, there is uncertainty whether state defendants must meet, like non-state defendants, the two-prong test of "state action" to secure the shelter of *Parker v. Brown*. Review of the decision of the California Court of Appeals by this Court will resolve these

uncertainties. The petition for certiorari should be granted.

Respectfully submitted,

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No. 82-1793

IN THE

Supreme Court of the United States

October Term, 1982

ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD and DIRECTOR OF THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,

Petitioners,

vs.

LEWIS-WESTCO & CO.,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeal of the State of California, First Appellate District

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF WINE & SPIRITS WHOLESALERS OF CALIFORNIA IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI

Wine & Spirits Wholesalers of California ("Wholesalers Association") hereby moves the Court for leave to file a brief *amicus curiae* in support of the Petition for Certiorari herein.[1]

[1]Wholesalers Association sought the consent of the parties to the filing of a brief *amicus curiae* in support of the Petition for Certiorari. Petitioners gave their consent but respondent, Lewis-Westco & Co., refused to consent. A copy of the consent is herewith filed with the Clerk of the Court.

Wholesalers Association is a trade association consisting of twenty-six licensed wholesalers of alcoholic beverages, having places of business located throughout the State of California, that sell approximately 80% of the total distilled spirits sold at wholesale to California retail licensees.[2]

The decision below, *Lewis-Westco & Co. v. Alcoholic Beverage Control Board, et al.*, 136 Cal. App. 3d 829 (1982), held invalid, as preempted by the Sherman Act, Section 24756 of the California Business and Professions Code. The statute requires each distilled spirits wholesaler to post its prices with the Department of Alcoholic Beverage Control and to sell only at the posted prices. The members of Wholesalers Association have a direct interest in the continued validity and enforcement of Section 24756.

Every member of Wholesalers Association has a substantial investment in a wholesale liquor business. Each investment was made, and continues to be made, in reliance upon California's Alcoholic Beverage Control Act, a comprehensive regulatory program governing the distribution and sale of distilled spirits. *See, Cal. Bus. and Prof. § 23000, et seq.; Cal. Bus. and Prof. § 25500, et seq.* (West 1983). The primary value of the price posting requirement to wholesalers is that it makes available current, accurate wholesale price information, which enables them to compete more effectively in the marketplace. In addition, as described in the proposed *amicus curiae* brief appended hereto, the posting of prices enables both the Department of Alcoholic Beverage Control and the wholesalers themselves to detect violations of such provisions of California's Alcoholic Bev-

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[2]Wholesalers Association was denied leave to intervene as a party and participated as *amicus curiae* before both the California Court of Appeal and the Alcoholic Beverage Control Appeals Board in the proceedings below. Appendix A to Petition, at A-6 n. 4.

erage Control Act as (i) Business and Professions Code Section 25503(c) and (d) which prohibit secret rebates and price discrimination, (ii) Business and Professions Code Section 23673, California's price affirmation law, and (iii) California Administrative Code Title 4, Rule 100(k) which prohibits sales below cost. Effective enforcement of these provisions against violators is of substantial importance to the California wholesalers who operate in compliance with such laws.

Although each of the following questions of law is at least mentioned in the Petition for Certiorari, Wholesalers Association respectfully requests leave to file the appended brief *amicus curiae* in order to provide a necessary supplemental analysis of these issues and to emphasize the importance of granting *certiorari* in this case:

1. The decision below is in direct conflict with *Rice v. Norman Williams Company*, 102 S. Ct. 3294 (1982), because Section 24756 was held invalid even though it neither requires nor authorizes conduct violative of the federal antitrust laws.

2. The decision below is in direct conflict with *Joseph E. Seagram & Sons v. Hostetter*, 384 U.S. 35 (1966), *Morgan v. Division of Liquor Control*, 664 F.2d 353 (2d Cir. 1981), and *U.S. Brewers Ass'n., Inc. v. Healy*, 532 F. Supp. 1312 (D. Conn. 1982), *rev'd on other grounds*, 692 F.2d 275 (2d Cir. 1982), all of which upheld analogous price posting statutes applicable to the alcoholic beverage industry, and with *Enrico's v. Rice, et al.*, Civ. No. C-81-0068 EFL (N.D. Cal. Nov. 26, 1982) (mem.) (App. F, A-77 *et seq.*), which held that Section 24756 is not preempted by the Sherman Act.

3. The decision below conflicts with the decisions of this Court and other federal courts holding that unilateral

conduct not involving any contract, combination or conspiracy in restraint of trade does not violate Section 1 of the Sherman Act. *United States v. Parke Davis and Company*, 362 U.S. 30, 37, 45-46 (1960); *Morgan v. Division of Liquor Control*, 664 F.2d 353; *U.S. Brewers Ass'n., Inc. v. Healy*, 532 F. Supp. 1312; *Enrico's v. Rice*, Civ. No. C-81-0068 EFL; *Harvey v. Fearless Farris Wholesale, Inc.*, 589 F.2d 451 (9th Cir. 1979); *Fuchs Sugars and Syrups, Inc. v. Amstar Corp.*, 602 F.2d 1025 (2d Cir. 1979), *cert. denied*, 444 U.S. 917 (1979).

4. Section 24756 is valid because it was enacted in the exercise of California's power under the Twenty-First Amendment to regulate the importation, distribution and sale of alcoholic beverages and serves the valid state interests of promoting competition in the industry and aiding in the enforcement of several provisions of California's Alcoholic Beverage Control Act.

5. The price posting statute is valid under the antitrust law exemption of *Parker v. Brown*, 317 U.S. 341 (1943), as elaborated in *California Retail Liquor Dealers Ass'n. v. Midcal Aluminum Company*, 445 U.S. 97 (1980).

Dated: July 6, 1983.

Respectfully submitted,

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QUESTIONS PRESENTED

1. Does the Sherman Act preempt a state statute which neither mandates nor authorizes conduct that violates the antitrust laws?

2. Is a state statute which requires the posting of prices, together with adherence to the posted prices, illegal *per se* under the antitrust laws?

3. Does the Sherman Act invalidate a state statute which requires unilateral price posting and adherence to posted prices by wholesalers of alcoholic beverages, but neither compels nor authorizes them to combine, contract or conspire with each other concerning the prices that are posted and charged?

4. Is California Business and Professions Code Section 24752 valid because it was enacted in the exercise of the State's power under the Twenty-First Amendment to regulate the importation, distribution and sale of alcoholic beverages?

5. Is Section 24756 valid because it falls within the state action exemption from the Sherman Act described in *Parker v. Brown*, 317 U.S. 341 (1943)?

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BRIEF AMICUS CURIAE OF WINE & SPIRITS WHOLESALERS OF CALIFORNIA IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE

Amicus Curiae, Wine & Spirits Wholesalers Association of California ("Wholesalers Association"), is a trade association consisting of twenty-six licensed wholesalers of alcoholic beverages, having places of business located throughout the State, that sell approximately 80% of the total distilled spirits sold at wholesale to California retail licensees.[1]

The decision below, *Lewis-Westco & Co. v. Alcoholic Beverage Control Board, et al.*, 136 Cal. App. 3d 829 (1982),[2] held invalid, as preempted by the Sherman Act, Section 24756 of the California Business and Professions Code. The statute requires each distilled spirits wholesaler to post its prices with the California Department of Alcoholic Beverage Control and to sell only at the posted prices. The members of Wholesalers Association have a direct interest in the continued validity and enforcement of Section 24756.

Every member of Wholesalers Association has a substantial investment in a wholesale liquor business. Each investment was made, and continues to be made, in reliance upon California's Alcoholic Beverage Control Act, a comprehensive regulatory program governing the distribution and sale of distilled spirits. *See, Cal. Bus. and Prof. Code § 23000, et seq.; Cal. Bus. and Prof. Code § 25500, et seq.* (West 1983). The primary value of the price posting

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[1]Wholesalers Association sought and was denied leave to intervene as a party and participated as *amicus curiae* before both the California Court of Appeal and the Alcoholic Beverage Control Appeals Board in the proceedings below. Appendix A to Petition, at A-6 n. 4. References hereinafter to the Petition's Appendices are cited as "App." with a designation by letter to the particular Appendix, including, where appropriate, the page number.

[2]The opinion of the Court of Appeal appears as Appendix A to the Petition for Certiorari filed herein with the Court. Citations to that opinion in this brief will be by reference to Appendix A.

requirement to wholesalers is that it makes available current, accurate wholesale price information, which enables them to compete more effectively in the marketplace. In addition, as described below (14-15, *infra*), the posting of prices enables both the Department of Alcoholic Beverage Control and the wholesalers themselves to detect violations of such provisions of California's Alcoholic Beverage Control Act as (i) Business and Professions Code Section 25503(c) and (d) which prohibit secret rebates and price discrimination, (ii) Business and Professions Code Section 23673, California's price affirmation law, and (iii) California Administrative Code Title 4, Rule 100(k) prohibiting sales below cost. Effective enforcement of these provisions against violators is of substantial importance to the California wholesalers who operate in compliance with such laws.

Statement of the Case

Section 24756 of the California Business and Professions Code, referred to herein at times as "the price posting statute", requires each wholesaler of distilled spirits, among others, to file with the California Department of Alcoholic Beverage Control ("the Department") a list setting forth *its own* sales prices of liquor to retailers and to sell to retailers in compliance with *its own* posted price list.[3] The Department has promulgated regulations (Cal. Admin. Code Tit. 4, R. 100), usually referred to as "Rule 100", which set forth the specific procedures to be followed by distilled

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[3]In pertinent part, Cal. Bus. & Prof. Code §24756 provides:

> Every distilled spirits manufacturer, brandy manufacturer, rectifier, and wholesaler shall file and maintain with the department a price list showing the prices at which distilled spirits are sold to retailers by the licensee. . . . Sales of distilled spirits to retailers by each distilled spirits manufacturer, brandy manufacturer, rectifier, and wholesaler shall be made in compliance with the price list of the licensee on file with the department.

spirits wholesalers to comply with Section 24756. For instance, all postings are public records (R. 100(g)(2)), and the posting period under Rule 100 currently is one calendar month (R. 100(b)(1)).[4]

This matter originated in a disciplinary action brought by the Department against Respondent, Lewis-Westco & Co., a distilled spirits rectifier/wholesaler licensed by California. The Department charged undisputed violations of Section 24756 and Rule 100 through sales of distilled spirits at other than Lewis-Westco's own posted prices. (App. C) Finding Lewis-Westco guilty, the Department imposed discipline, and its action was affirmed by an order of the Alcoholic Beverage Control Appeals Board ("the Board"). (App. B) Lewis-Westco then brought an original, extraordinary writ proceeding in the California Court of Appeal to review the Board's decision. The Court of Appeal annulled the Board's order on the ground that "the price posting statute must be declared invalid as an illegal restraint of trade." (App. A at A-3, A-10-11) Without so stating, the Court of Appeal necessarily held that the price posting statute is preempted by the Sherman Act under the Supremacy Clause.

The Court of Appeal apparently believed that every state statute requiring price posting and adherence to posted prices

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[4]At the time of the events giving rise to the disciplinary proceeding below, the posting period was two consecutive calendar months. (App. D, A-60) Currently, Rule 100 requires each wholesaler to file and maintain with the Department a new written schedule of prices and quantity discounts every month, on or before the fifteenth day of the month, to become effective on the first day of the following month. (R. 100(a) & (b)(1)) A wholesaler may thereafter reduce its prices to meet competitive prices on the same or competitive brands by filing an amended schedule for the effective posting period. (R. 100(f)) Rule 100 prohibits any wholesaler from advertising or selling at other than its posted price schedule for the posting period. (R. 100(k)) All quantity discounts filed with the Department are deemed published in full to all retailers serviced by the wholesaler licensee if the entire schedule of discounts is advertised in an approved trade journal or industry price book of general circulation. (R. 100(g)(8) & (b)(5))

is illegal *per se* under the Sherman Act. The Court alluded to what it called "the anticompetitive effect resulting from the posting system's facilitation of price fixing among producers" (*Id.* at A-9), and said that "the mandated price posting, coupled with the regulatory compliance condition, openly sanctions and promotes an exchange of price information among competitors calculated to produce a uniform price structure. . . ." *Id.* at A-10.[5]

Summary of Argument

The petition for writ of certiorari should be granted and the decision below reversed for each and all of the following reasons:

First, the decision is in direct conflict with *Rice v. Norman Williams Company*, 102 S. Ct. 3294 (1982), because the price posting statute was held invalid even though it neither requires nor authorizes conduct violative of the federal antitrust laws. The Court of Appeal cited *Norman Williams* but failed to apply the reasoning of that decision. (App. A at A-7 n. 6)

Second, the decision is in direct conflict with *Joseph E. Seagram & Sons v. Hostetter*, 384 U.S. 35 (1966), *Morgan v. Division of Liquor Control*, 664 F.2d 353 (2d Cir. 1981), and *U.S. Brewers Ass'n., Inc. v. Healy*, 532 F. Supp. 1312 (D. Conn. 1982), *rev'd on other grounds*, 692 F.2d 275 (2d Cir. 1982), each of which upheld an analogous price

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[5]The state court also said, "Here, as in *Rice* [21 Cal.3d 431 (1978)], petitioner introduced statistical evidence demonstrating a progressive elimination of price variations between wholesalers selling the same brand and competing brands." *Id.* at A-9. But the court did not say (and the record does not show) that such evidence applied to any but a few brands of gin, bourbon whiskey and scotch whiskey, that the price changes were caused by a contract, combination, or conspiracy among wholesalers, or that price variations would increase if the statute were held invalid.

posting statute applicable to the alcoholic beverage industry. The decision below is also in direct conflict with the decision of the United States District Court for the Northern District of California upholding the validity of the very price posting statute here in issue. *Enrico's v. Rice, et al.*, Civ. No. C-81-0068 EFL (N.D. Cal. Nov. 26, 1982) (mem.) (App. F, A-77 *et seq.*), now on interlocutory appeal to the Court of Appeals for the Ninth Circuit. *Enrico's v. Rice, et al.*, Case No. 82-8138.

Third, the decision conflicts with decisions of this Court and other federal courts holding that unilateral conduct not involving any contract, combination or conspiracy in restraint of trade does not violate Section 1 of the Sherman Act. *United States v. Parke Davis and Company*, 362 U.S. 30, 37, 45-46 (1960); *Morgan v. Division of Liquor Control*, 664 F.2d 353 (price posting statute upheld); *U.S. Brewers Ass'n., Inc. v. Healy*, 532 F. Supp. 1312 (price posting statute upheld); *Harvey v. Fearless Farris Wholesale, Inc.*, 589 F.2d 451 (9th Cir. 1979); *Fuchs Sugars and Syrups, Inc. v. Amstar Corp.*, 602 F.2d 1025 (2d Cir. 1979), *cert. denied*, 444 U.S. 917 (1979).

Fourth, the price posting statute is valid because it was enacted in the exercise of California's power under the Twenty-First Amendment to regulate the importation, distribution and sale of alcoholic beverages. In addition, the statute serves the valid state interests of promoting competition in the industry and aiding in the enforcement of several provisions of California's Alcoholic Beverage Control Act.

Fifth, the price posting statute is valid under the antitrust law exemption of *Parker v. Brown*, 317 U.S. 341 (1943), as elaborated in *California Retail Liquor Dealers Ass'n. v. Midcal Aluminum Company*, 445 U.S. 97 (1980), because in regulating the sale of alcoholic beverages, the statute

imposes the posting requirement directly rather than through the action of private parties, and the State actively supervises California's price posting policy through consistent enforcement, monitoring of the statute's operation, and modification of the posting requirement from time to time.

Sixth, the decision below casts unjustified doubt upon the legality of the alcoholic beverage price posting statutes of at least seventeen other states[6] and thus threatens disruption of the regulation of the alcoholic beverage industry in those states.

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[6]In addition to California, at least the following seventeen states have alcoholic beverage laws which impose price posting requirements functionally similar to Section 24756: Connecticut, Delaware, Florida, Georgia, Hawaii, Kansas, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, New Jersey, New York, Oklahoma, Oregon, South Dakota and Tennessee. In these states, the relevant laws provide for posting of prices for sales from wholesaler to retailer, and/or for sales from manufacturer to wholesaler. See Appendix 1 to this brief for a table listing the various laws.

ARGUMENT

A. The Court of Appeal's Decision Holding California's Price Posting Statute Invalid as an Illegal Restraint of Trade Is Clearly Erroneous in Light of This Court's Decision in *Rice v. Norman Williams Company*, 102 S. Ct. 3294 (1982).

Again a California Court of Appeal has demonstrated that it simply does not understand the Supremacy Clause or the relationship of the federal antitrust laws to economic regulations enacted by the several states. Although it cited *Rice v. Norman Williams Company*, 102 S. Ct. 3294 (1982) (App. A at A-7 n. 6), the appellate court failed entirely to apply the principles stated in that decision.

In *Rice v. Norman Williams Company*, 102 S. Ct. at 3299, this Court said, "In determining whether the Sherman Act preempts a state statute . . . the inquiry is whether there exists an irreconcilable conflict between the federal and state regulatory schemes." The antitrust laws — the relevant federal regulatory scheme in this case — do not preempt the entire field of economic regulation as a federal domain. The Sherman Act proscribes only specified anticompetitive conduct by businessmen — contracts, combinations and conspiracies that unreasonably restrain trade, monopolization, attempts to monopolize and the like. Accordingly, a state regulatory scheme will be adjudged to conflict with the Sherman Act if — *and only if* — the state either *requires* or *authorizes* the very anticompetitive conduct by businessmen which the antitrust laws forbid. This principle was, indeed, precisely the basis of this Court's decision in *Rice v. Norman Williams Company*, 102 S. Ct. 3294, wherein the Court reversed a California Court of Appeal decision invalidating another provision of California's Alcoholic Beverage Control Act. In doing so, the Court said:

> Our decisions in this area instruct us, therefore, that a state statute, when considered in the abstract, may be condemned under the antitrust laws only if it *mandates* or *authorizes* conduct that necessarily constitutes a violation of the antitrust laws *in all cases*, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute. Such condemnation will follow under §1 of the Sherman Act *when the conduct contemplated by the statute is in all cases a per se violation*. If the activity addressed by the statute does not fall into that category, and therefore must be analyzed under the rule of reason, *the statute cannot be condemned in the abstract*. Analysis under the rule of reason requires an examination of the circumstances underlying a particular economic practice, and therefore does not lend itself to a conclusion that a statute is facially inconsistent with federal antitrust laws. *Id.* at 3300 (emphasis added).

Judged by this standard, California's price posting statute clearly does not violate the Sherman Act and thus is not preempted. The statute requires *only* that each wholesaler post *its own* prices for the following month and that the wholesaler adhere to *its own* posted prices for that period. The statute neither requires nor authorizes wholesalers to contract, combine or conspire with each other to fix or affect the prices which they individually will post and charge. If they were to do so, Section 24756 would not insulate their conduct from scrutiny under the Sherman Act. As was said in *Rice v. Norman Williams Company*, in respect of the California designation statute there under review:

> . . . The manner in which a distiller utilizes the designation statute and the arrangements a distiller makes with its wholesalers will be subject to Sherman Act analysis under the rule of reason. There is no basis, however, *for condemning the statute itself* by force of

the Sherman Act. 102 S. Ct. at 3301 (emphasis added).[7]

The decision of the Court of Appeal in this case is so obviously inconsistent with *Rice v. Norman Williams Company* that this Court would clearly be warranted in granting certiorari and reversing the judgment below summarily on the authority of that recent and controlling decision. *See, e.g., Chase Manhattan Bank, N.A. v. Finance Administration of the City of New York*, 440 U.S. 447 (1979); *United States v. Hulley*, 358 U.S. 66 (1958); *District Lodge 34 v. Cavett*, 355 U.S. 39 (1957).

B. The Court of Appeal's Condemnation of the Price Posting Statute Conflicts With Decisions of This Court and Other Federal Courts Upholding Analogous Statutes.

This Court and other federal courts have upheld analogous price posting statutes applicable to the sale of alcoholic beverages. In *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966), this Court held valid, as against an attack based, *inter alia*, on Sherman Act grounds, a New York statute which required distillers to file with the State Liquor Authority monthly price schedules for sales to New York wholesalers and retailers. The statute also required that the filing be accompanied by an affirmation that the prices posted were no higher than the lowest prices at which

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[7]In *Rice v. Norman Williams Company*, 102 S. Ct. at 3300, the Court also said that "It is irrelevant for our purposes that the distiller's ability to restrict intrabrand competition in California has the imprimatur of a state statute." The Court added the following in a footnote:

> This is merely another way of stating that the designation statute might have an anti-competitive effect when applied in concrete factual situations. See *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 439 U.S. 96, 110-111, 58 L.Ed.2d 361, 99 S. Ct. 403, 412-413 (1978). We have explained, however, that *this is insufficient to declare the statute itself void on its face. Id.* at 3300 (emphasis added).

sales were made anywhere in the United States during the preceding month. Thus, as the Court there stated: ". . . a brand owner doing business in New York must keep himself informed of the prices charged by 'all related persons' throughout the United States." *Id.* at 41. Distillers were also required to sell at the posted prices. The Court nevertheless held that there was no conflict between the New York statute and the Sherman Act.

In *Morgan v. Division of Liquor Control*, 664 F.2d 353 (2d Cir. 1981), the Court of Appeals for the Second Circuit upheld Connecticut statutes which, like California's price posting law, required each alcoholic beverage manufacturer and wholesaler to *post its own prices* in advance for each month and to *individually adhere to those prices* for the posted month. The Court of Appeals rejected a Sherman Act challenge to the Connecticut law because the statutes did not "authorize or compel private parties to enter contracts or combinations to fix prices in violation of Section 1 of the Sherman Act." *Morgan v. Division of Liquor Control*, 664 F.2d at 355. In *U.S. Brewers Ass'n., Inc. v. Healy*, 532 F. Supp. 1312 (D. Conn. 1982), *rev'd on other grounds*, 692 F.2d 275 (2d Cir. 1982), the District Court upheld, as not violative of the antitrust laws, Connecticut's beer price affirmation and posting statute, which required adherence to posted prices during the effective monthly period for posting.

After the decision in *Lewis-Westco* was entered and was brought to its attention, the District Court for the Northern District of California held in *Enrico's v. Rice, et al.*, Civ. No. C-81-0068 EFL (N.D. Cal. Nov. 26, 1982) (mem.), that California's price posting statute does *not* violate Section 1 of the Sherman Act. (App. F) An interlocutory appeal from this decision is pending before the Ninth Circuit Court of Appeals and is scheduled for argument on July 12, 1983.

Enrico's v. Rice, et al., Case No. 82-8138 (U.S.C.A. 9th Cir.).[8]

C. California's Price Posting Statute Does Not Violate the Sherman Act Because It Requires Only Unilateral Conduct by Each Distilled Spirits Wholesaler.

Section 1 of the Sherman Act proscribes only a "contract, combination . . . or conspiracy in restraint of trade . . . ." 15 U.S.C. § 1. Section 1 does not apply to *unilateral* conduct — much less unilateral conduct ordered by the State through a sovereign act of government.[9] A Section 1 violation, like other illegal conspiracies, requires a *plurality* of participants and an *agreement* among them. *United States v. Parke Davis and Company*, 362 U.S. 30, 37, 45-46 (1960); *Harvey v. Fearless Farris Wholesale, Inc.*, 589 F.2d 451, 455 (9th Cir. 1979); *Fuchs Sugars & Syrups, Inc. v. Amstar Corp.* 602 F.2d 1025, 1029 (2d Cir. 1979), *cert. denied*, 444 U.S. 917 (1979). The California Court of Appeal failed to address or apply these long-established principles in this case.

California's price posting statute does not violate the Sherman Act because it neither requires nor authorizes any wholesaler to enter into a contract, combination or conspiracy in restraint of trade. Section 24576 and Rule 100

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[8]Even the voluntary exchange of price information pursuant to an agreement among competitors is not *per se* illegal, but must be adjudged under the rule of reason. *United States v. Citizens & Southern Nat. Bank*, 422 U.S. 86, 113 (1975); *United States v. United States Gypsum Company*, 438 U.S. 422, 441, n. 16 (1978); *Maple Flooring Mfrs. Ass'n. v. United States*, 268 U.S. 563 (1925). The view expressed in these judicial decisions finds support in scholarly discussion of the subject. Posner, "*Information and Antitrust: Reflections on the Gypsum and Engineers Decisions*," 67 Geo. L.J. 1187 (1979).

[9]Furthermore, as discussed in Part E, *infra*, pp. 15-16, the prohibitions of the Sherman Act do not apply to sovereign state action like that manifested in California's price posting law.

require only that each wholesaler post *its own* prices for *its own* products and adhere to *its own* prices for one calendar month after they become effective. Such unilateral action, if engaged in by individual wholesalers without the compulsion of state law, would not violate Section 1 of the Sherman Act.

In *Morgan v. Division of Liquor Control*, 664 F.2d at 353, and *U.S. Brewers Ass'n., Inc. v. Healy*, 532 F. Supp. at 1312, the courts upheld Connecticut price posting statutes on the ground that they required only unilateral conduct and did not compel or authorize private parties to contract or combine to fix prices in violation of Section 1 of the Sherman Act.

It necessarily follows that the Court of Appeal erred when it held that "the price posting statute must be declared invalid as an illegal restraint of trade" even though only unilateral conduct of wholesalers is required by the statute (App. A at A-10-11). This was, indeed, one of the principal bases upon which the United States District Court for the Northern District of California declined to follow *Lewis-Westco* and instead held that the California price posting statute does *not* violate the antitrust laws. In its Memorandum of Decision (App. F, A-77 *et seq.*) the Court said, *inter alia*:

> A violation of Section 1 of the Sherman Act cannot be based on unilateral action. *United States v. Colgate & Co.*, 250 U.S. 300, 305-6 (1919); Sullivan, *Antitrust*, p. 311 (1977). The section condemns concerted activity only . . . . [citing *Morgan, supra.*] *Id.* at A-81.
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> . . . Rule 100 mandates only unilateral action by each liquor wholesaler, *independent activity insufficient to constitute a Section 1 violation. Id.* at A-83 (emphasis added).

The District Court's analysis is sound and its rejection of the specious reasoning of *Lewis-Westco* should be adopted by this Court.

D. California's Price Posting Statute Is Valid Because It Falls Within the Regulatory Powers of California Under the Twenty-First Amendment.

That the several states have very broad power to regulate the importation, distribution and sale of alcoholic beverages is not subject to dispute. *See, e.g., California Retail Dealers Ass'n. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981); *State Board of Equalization v. Young's Market Co.*, 299 U.S. 59 (1936). California's price posting statute, enacted in the exercise of that power, is therefore valid even if — contrary to the argument presented above — the statute would otherwise violate the antitrust laws. Moreover, even if the reconciliation of federal and state interests described by the Court in *Midcal* (445 U.S. at 110) were applicable here, the statute would be valid because it serves a number of important state interests which outweigh the statute's marginal impairment, if any, of antitrust policy.

Promotion of Competition. The price posting statute promotes competition in the distilled spirits wholesaler-retailer market by assuring the dissemination of reliable and conveniently available price information to wholesalers and their retail customers. Both courts and scholars have recognized the pro-competitive value of such information. *See, supra*, note 8, at 11. In addition, price posting enhances competition because it facilitates "pool buying" by groups of small retailers. California's "pool buying" statute (Cal. Bus. & Prof. Code §24400) permits retailers to combine their purchases to take advantage of quantity discounts. This helps to preserve a competitive market structure against the

encroachment of monopolization efforts at the retail and wholesale levels of distribution. Without the price and quantity discount information made available by the statute, pool buying would be much less effective.

Aid to Enforcement of Regulations. The dissemination of price information required by the statute aids the enforcement of other provisions of California's Alcoholic Beverage Control Act. For example, Section 25503 of the Business and Professions Code prohibits, among other things, secret rebates (subparagraph (c)) and price discrimination (subparagraph (e)) in respect of alcoholic beverages. The disclosure required by the posting laws facilitates efforts by the Department and the industry to detect violations of these provisions. When the Department learns of prices being offered by a retailer that appear to be inordinately low in relation to cost, reference can be made to wholesalers' posted prices to determine whether there is so small a margin between those prices and the retailer's prices as to create a reasonable suspicion that the retailer is the recipient of secret rebates or favorable discriminatory pricing. Victims of unfair trade practices are better alerted to discriminatory pricing if they know the posted price at which all transactions should take place. Public disclosure of prices under the posting law reduces opportunities for exploitation of market power and secret collusion in derogation of competition. *See, Posner*, 67 Geo. L.J. at 1197-1198; 2 *Von Kalinowski*, "Antitrust Laws and Trade Regulation," §6I.06[2] at 6I-43 (1982).

The price posting statute also facilitates administration of California's Alcoholic Beverage Control Act in other respects. Rule 100(k) prohibits sales below a seller's cost and Section 23673 of the Business and Professions Code (price affirmation law) requires manufacturers to sell liquor to wholesalers in California at a price no higher than that

offered elsewhere in the nation. The disclosures required by Section 24756 and Rule 100 are of substantial assistance in the enforcement of these laws. The ready availability of accurate price information through posting permits convenient comparison of prices and thus makes detection of illegal activity more likely and less costly, thereby encouraging members of the industry to compete only in lawful ways. The State has a legitimate interest in regulating commerce in liquor to assure compliance with its laws. *See, e.g., Heublein, Inc. v. South Carolina Tax Commission*, 409 U.S. 275, 282-83 (1972); *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 139 (1939).

Because the price posting statute relates to the distribution and sale of alcoholic beverages and serves a variety of California's regulatory and economic interests with respect thereto, the statute falls well within the regulatory power of California under the Twenty-First Amendment.

E. California's Price Posting Statute Falls Within the State Action Exemption of *Parker v. Brown*, 317 U.S. 341 (1943).

Section 24756 and Rule 100 are valid because they constitute sovereign state action and therefore fall within the state action exemption from the Sherman Act first recognized by this Court in *Parker v. Brown*, 317 U.S. 341 (1943). In *California Retail Liquor Dealer Ass'n. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), the Court, after reviewing its state action exemption decisions subsequent to *Parker*, said:

> These decisions establish two standards for antitrust immunity under *Parker v. Brown*. First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy"; second, the policy must be "actively supervised" by the state itself. . . .

Id. at 105.

California's price posting statute clearly meets both of these requirements. The price posting policy is "clearly articulated and affirmatively expressed" in Section 24756 and that policy is supervised by California, acting through its Department of Alcoholic Beverage Control.

The State itself has decided that there will be both posting of prices and adherence to those prices. Moreover, the State determines the length of time for which adherence is required, and imposes both the posting and adherence requirements directly rather than through the action of private parties. Unlike the circumstances of *Midcal, there is no private exercise of economic power with respect to third persons which the State needs to supervise.* Therefore, the statute falls within the core of the state action exemption of *Parker v. Brown* as a matter of law.

Moreover, the Department actively administers and enforces the price posting law, monitors its operation, and holds hearings to determine whether Rule 100 should be revised. This is surely "active supervision by the State" within the meaning of *Midcal* and constitutes the kind of "pointed re-examination by the policy maker" which was held in *Bates v. State Bar of Arizona*, 433 U.S. 350, 362 (1977), to satisfy the "active supervision" requirement of the state action exemption. *Cf. Morgan v. Division of Liquor Control*, 664 F.2d at 356, where the court found active state supervision of Connecticut's price posting statute in the fact that the legislature frequently re-examined the operation of the price posting system.

Conclusion

Amicus Curiae submits that for the reasons set forth above the Petition for Writ of Certiorari herein should be granted.

Dated: July 6, 1983.

Respectfully submitted,

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APPENDIX 1.
Price Posting Laws

A. *Sales from Wholesaler to Retailer:*

1)	Connecticut:	Conn. Gen. Stat. § 30-68 (1982) Conn. Gen. Stat. § 30-63 (1982)
2)	Delaware:	Del. Regs. Rule 29, Liquor Cont., L. Rep. (CCH) Para. 4104 (August 30, 1981)
3)	Georgia:	Ga. Admin. Comp. Ch. 560-2-3-45 (1982)
4)	Hawaii:	Hawaii Rev. Stat. § 281-43 (1955)
5)	Maryland:	Md. Ann. Code art. 2B, § 109 (1967)
6)	Minnesota:	Minn. Stat. § 340.983 (1975)
7)	Missouri:	Mo. Rev. Stat. § 322.332 (1978)
8)	Nebraska:	Neb. Rev. Stat. §§ 53.168.01-.03 (1981)
9)	New Jersey:	N.J. Rev. Stat. § 54:45-1 (1955)
10)	New York:	N.Y. Alcoholic Beverage Control Law § 101-b(3)(b) (McKinney 1979)
11)	Oklahoma:	Okla. Alcoholic Bev. Cont. Board Regs., Liquor Cont. L. Rep. (CCH) Para. 4049 (October 15, 1976)
12)	Oregon:	Or. Admin. R. 845-10-210 (1977)
13)	South Dakota:	S.D. Admin. R. 64:75:03:02 (1976)
14)	Tennessee:	Tenn. Code Ann. § 57-6-104(a) (1974)

B. *Sales from Manufacturer to Wholesaler:*

1)	Connecticut:	Conn. Gen. Stat. § 30-63 (1982)
2)	Delaware:	Del. Code Ann. tit. 4, § 508 (1953)
3)	Florida:	Fla. Stat. Ann. § 565.14 (West 1981)
4)	Hawaii:	Hawaii Rev. Stat. § 281-43 (1955)
5)	Kansas:	Kan. Stat. Ann. § 41-1101 (1979). Kan. Admin. Regs. 14-4-7(e) (1980) Kan. Admin. Regs. 14-4-11(a) (1981)
6)	Maryland:	Md. Ann. Code art. 2B, § 109 (1967)
7)	Massachusetts:	Mass. Gen. Laws Ann. ch. 138, § 25B (West 1970) Mass. Gen. Laws Ann. ch. 138, § 25C (West 1970)
8)	Nebraska:	Neb. Rev. Stat. §§ 53.168.01-.03 (1981)
9)	New Jersey:	N.J. Rev. Stat. § 54:45-1 (1955)
10)	New Mexico:	N.M. Stat. Ann. § 60-8A-13-12 (1981)
11)	New York:	N.Y. Alcoholic Beverage Control Law § 101-b(3)(a) (McKinney 1979)
12)	Oklahoma:	Okla. Alcoholic Bev. Cont. Board Regs., Liquor Cont. L. Rep. (CCH) Para. 4047 (April 18, 1980)
13)	Oregon:	Or. Admin. R. 845-10-210 (1977)